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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 738

JOSEPH W. HART, LUELLA F. HART and J. CARL RUSSELL,
Petitioners,

vs.

FEDERAL RESERVE BANK OF ATLANTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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INDEX.

	Page
Ground on which jurisdiction of court is invoked	2
Questions presented	2
Statutes and executive orders involved	3
Statement of the case	4
The decision of the District Court	8
The affirmance by the Court of Appeals	9
Argument	10
The applicable state law	10
Former judgment no bar	16
Actions of Federal Reserve Bank unauthorized by law—privity with United States of America lacking	22
Want of authority in Federal Reserve Bank of Atlanta to release lien to allow private sale of subdivision to be made	25
Doctrine of sovereign immunity not available to Federal Reserve Bank	27
Reason relied on for granting the writ	29
Prayer	29
Appendix	31
Opinion of Sixth Circuit	31
Motion of the defendants	34
Memorandum	35
Order	45

Cases Cited.

American Sales Corporation v. United States (C. A. 5th), 32 F. 2d 141, affirming U. S. v. American Sales Corporation, 27 F. 2d 389, and cer. den.	26
American Sales Corporation v. U. S., 280 U. S. 574, 50 S. Ct. 29, 74 L. ed. 625	26

Bank of New Brockton v. Dunnavant, 204 Ala. 636, 87 So. 105 ..... 11, 15
Brady v. Roosevelt S. S. Co., 318 U. S. 575, 63 S. Ct. 425, 87 L. ed. 471 27
Case of Tweed, 16 Wall. 504, 21 L. Ed. 389 ..... 22, 26
Cosby v. Buchanan, 23 Wall. 420, 23 L. Ed. 138 20
De Moville v. Merchants & Farmers Bank, 237 Ala. 186 So. 704, 713 10
DeSollar v. Hanscome, 158 U. S. 216, 221, 15 S. Ct. 816, 39 L. ed. 956 16
Dibert v. Wernicke (C. A. 6th), 214 Fed. 673 15
Dozier v. Farrior, 187 Ala. 181, 65 So. 364 11
Harmon v. Dothan Nat. Bank, 186 Ala. 360, 64 So. 621 10
Hiscock v. Varick Bank, 206 U. S. 28, 27 S. Ct. 681, 51 L. ed. 945 10
Johnson v. Selden, 140 Ala. 418, 37 So. 249, 103 Am. St. R. 49 ..... 10, 12
Keifer v. R. F. A., 306 U. S. 381, 59 S. Ct. 516, 83 L. ed. 784 27
Mahone v. Williams, 39 Ala. 202, 217 10
Mammoth Oil Co. v. U. S., 275 U. S. 13, 48 S. Ct. 1, 72 L. ed. 137 20
Marsh et al. v. Elba Bank & Trust Co., 221 Ala. 683, 130 So. 323 10
Murphy v. Merchants National Bank of Mobile, 240 Ala. 688, 200 So. 895, 904 10
Owensboro v. Cumberland Tel & Tel. Co., 230 U. S. 76, 33 S. Ct. 995, 57 L. ed. 1398 17
Pauly v. Trust Co., 165 U. S. 606 at page 620, 17 S. Ct. 465, at page 470, 41 L. ed. 844 15
The New York, 3 Wheat. 59, 4 L. Ed. 33 20
United States of America v. Joseph W. Hart and J. Carl Bussell, 312 F. 2d 127 ..... 6, 8
Zadek v. Burnett, 176 Ala. 80, 57 So. 47, 450 10

Statutes and Executive Orders Involved.

Executive Order No. 9070, of February 24, 1942, Consolidating the Housing Agencies and Functions of the Government into the National Housing Agency 3, 24

Executive Order No. 9112, of March 26, 1942, Authorizing Financing Contracts to Facilitate the Prosecution of the War 3, 9, 22, 23, 24, 25, 28

First War Powers Act, 1941—Public Law—Ch. 593—Public Law 354—77th Congress, 1st Sess., Approved December 18, 1941—55 Stat. 838 3

Mobilization of Small Business Act—Ch. 404, Public Law 603, 77th Congress, 1st Sess., Approved June 11, 1942—56 Stat. 351 ..... 3, 24

National Housing Act Amendment—Ch. 319, Public Law 559—77th Congress, 1st Sess., Approved May 26, 1942—56 Stat. 301 ..... 3, 25

The pertinent text or excerpts from the statutes and executive orders involved are set forth in the Appendix hereto 3

Textbooks Cited.

Amount of Property Sold Under Mortgage Foreclosure in L. R. A. (N. S.), 1917B, pages 517, 526-7. 13

Federal Reserve Bulletin, May 1942, pages 424-427 .. 25

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FEDERAL RESERVE BANK OF ATLANTA,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners, Joseph W. Hart, Luella F. Hart and J. Carl Russell, ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case on June 21, 1967, which affirmed a judgment of the United States District Court for the Middle District of Tennessee. The opinions below have not been reported but are appended hereto.

GROUND ON WHICH JURISDICTION OF COURT IS INVOKED.

(i) The judgment of the Court of Appeals sought to be reviewed was entered June 21, 1967. Petitioners filed a timely petition to rehear which was denied on July 20, 1967.

(ii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Where a federal reserve bank, purporting to act as fiscal agent of the United States on behalf of the War Department pursuant to Executive Order No. 9112 of March 26, 1942 authorizing the guarantee to commercial banks against loss on loans made to concerns to finance the performance of war orders, executed a guarantee agreement to banks of the balance of loan for defense housing remaining after the 90% portion which was F. H. A. insured, dealt with the collateral in the form of mortgage on the housing development in such manner as, according to applicable state law, amounted to a violation of the fiduciary duty of a pledgee or mortgagee, is it protected by the doctrine of sovereign immunity from liability to the pledgor's guarantors who have suffered injury from a failure to realize the reasonable value of the security for the loan?

2. Is there a privy relationship between the Federal Reserve Bank of Atlanta and the United States which entitles it to invoke the doctrine of collateral estoppel by judgment arising from a finding in a former suit brought by the United States of America against petitioners that they did not carry the burden of substantially proving the defense of breach of duty by the federal reserve bank's assignors, two Alabama banks, in same transaction; and

was the adjudication of the issues raised in the former litigation conclusive of the issues raised in the present case?

3. Is it a misuse of his official power for the Attorney General of the United States to defend this action for the federal reserve bank and to refuse production of the government files which would shed light on the transaction?

STATUTES AND EXECUTIVE ORDERS INVOLVED.

First War Powers Act, 1941—Public Law—Ch. 593—Public Law 354—77th Congress, 1st Sess., Approved December 18, 1941—55 Stat. 838.

Executive Order No. 9070, of February 24, 1942, Consolidating the Housing Agencies and Functions of the Government into the National Housing Agency.

Executive Order No. 9112, of March 26, 1942, Authorizing Financing Contracts to Facilitate the Prosecution of the War.

National Housing Act Amendment—Ch. 319, Public Law 559—77th Congress, 1st Sess., Approved May 26, 1942—56 Stat. 301.

Mobilization of Small Business Act—Ch. 404, Public Law 603, 77th Congress, 1st Sess., Approved June 11, 1942—56 Stat. 351.

The pertinent text or excerpts from the statutes and executive orders involved are set forth in the Appendix hereto.

STATEMENT OF THE CASE.

In 1942 and 1943, The First National Bank of Birmingham, Birmingham, Alabama, and The Merchant's National Bank of Mobile, Mobile, Alabama, loaned an Alabama corporation, Country Club Village Corporation, $2,200,000.00 for the construction of a residential subdivision in Mobile, Alabama. Notes for this amount executed by the corporation were guaranteed by petitioners Hart and Russell individually, they being the owners of all but one share of the capital stock of the corporation. Luella F. Hart, wife of Joseph W. Hart, was the owner of the remaining one share. All of the stock was pledged to secure the obligation of the guarantors.

The loan was further secured by a mortgage executed by the borrowing corporation covering the entire housing development.

The lending banks applied to Federal Reserve Bank of Atlanta, as fiscal agent of the United States, for a guarantee of the loan, pursuant to Executive Order No. 9112 of March 26, 1942. Pursuant to the application, Federal Reserve Bank of Atlanta in the name and on behalf of War Department of the United States and as Fiscal Agent of the United States executed a Guarantee Agreement containing the obligation to purchase, on demand of the banks, 90% of the unpaid principal amount of the loan.

The permanent financing of the subdivision development was to be by F. H. A. guaranteed mortgages on the 425 individual dwelling units after completion. After the completion of the construction and the permanent financing with mortgages guaranteed by F. H. A. for 90% of the replacement cost of the property, a balance of the construction loans made by the two banks in the sum of $183,345.55 remained unpaid. Upon demand of the banks,

the War Department, through Federal Reserve Bank of Atlanta, performed the obligation of the Guarantee Agreement, paying to the two banks $165,742.34.*

Thereafter, the banks controlling the mortgaging corporation through the stock pledge, with the participation of Federal Reserve Bank of Atlanta, made a sale of the entire subdivision to another corporation, Spring Hill Homes, Inc., for $37,170.00.

The note of Country Club Village Corporation and the guaranty signed by Hart and Russell secured by the stock of the corporation were assigned by the banks to Federal Reserve Bank of Atlanta which in turn assigned the same to the United States of America.

In order to effect the sale of the properties, Federal Reserve Bank of Atlanta, purporting to act as Fiscal Agent of the United States of America, released the mortgagor's subsidiary corporation which held the legal title to the subdivision from the obligation to execute a blanket second mortgage upon the subdivision inferior to the F. H. A. guaranteed mortgages on the individual housing units. If this release had not been made, within a few months time, piecemeal sales of the houses would have produced enough to pay in full the indebtedness, which after the assignment was held and owned 10% by the two banks and 90% by the United States of America. The buyer realized a profit of approximately $375,000.00 from the purchase of the subdivision for $37,170.00.

On Nov. 6, 1956 (eleven years after the sale of the subdivision) the United States of America brought suit against

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* In order to hold that such a guaranty was valid, we must assume that Congress, after limiting the authority of the Federal Housing Administrator to insuring 90% loans, proceeded to authorize the War Department to guarantee the payment of the 10% uninsured portion of the loan. (The guarantee here was 90% of the uninsured 10%.) A mere statement of the proposition imputes a near imbecility to Congress.

Hart and Russell on their guaranty of the note for $2,200,000.00 and recovered a judgment against them in the United States District Court for the Middle District of Tennessee on January 29, 1962 for the principal balance remaining due after crediting thereupon the proceeds of the sale and certain other recoveries. The amount of the judgment was $83,900.63 plus interest totaling $119,850.56. This judgment was affirmed on appeal by the Circuit Court of Appeals for the Sixth Circuit. **United States of America v. Joseph W. Hart and J. Carl Russell, 312 F. 2d 127.**

Petitioners on Nov. 6, 1962 sued Federal Reserve Bank of Atlanta in the United States District Court for the Middle District of Tennessee to recover damages for the injury sustained by them from the wanton sacrifice of the security for the indebtedness on which the judgment against Hart and Russell was rendered.

The jurisdiction of the district court was on the ground of diversity of citizenship between plaintiffs-appellants and the defendant Federal Reserve Bank.

The defendant Federal Reserve Bank filed an answer to the complaint which was signed by the United States Attorney. In this answer, while there was no denial of the allegation in the complaint that it participated in making the sale of the assets and property held by the pledgee banks (The First National Bank of Birmingham and the Merchants National Bank of Mobile), it "categorically denied that the sale of the Country Club Subdivision resulted in a wanton sacrifice of the security and that the sale was made in bad faith and was fraudulently contrived. It denied "that there was ever any repudiation of trust or any abuse of trust, and alleges that defendant acted in the capacity of a holder in due course of negotiable papers rather than in a trust capacity."

The defendant's answer, by the United States Attorney, averred as an affirmative defense:

> "19. That the defendant in all its dealings with the plaintiffs, was acting as fiscal agent of the United States and is immune from liability for any act it may have done, both by common law and under the provisions of said Executive Order 9112 (7 Federal Register 2637), which provides in part that 'no Federal Reserve Bank shall have any responsibility or accountability except as agent of the War Department, Navy Department, or Maritime Commission, as the case may be.' "

Plaintiffs, after the filing of the answer, propounded interrogatories to the defendant seeking discovery of "all reports, communications, memoranda, letters, appraisals, documents and other writings in any way pertaining to the sale of the Country Club Village property to Spring Hill Homes, Inc., or L. B. Ellinor" (App. 21a). The defendant obtained an order staying the answering of the interrogatories until thirty days after the court shall have ruled on the validity of the affirmative defenses raised by the defendant in its answer.

Then the defendant by the U. S. Attorney filed a motion for a summary judgment asserting as grounds: *res judicata* by reason of the prior judgment in favor of the United States, governmental immunity from suit and that the action was barred by laches and the statutes of limitations.

Plaintiffs, in their original complaint, made no issue as to lack of authority of the defendant Federal Reserve Bank to act in the transaction as the fiscal agent of the United States of America.

Subsequent to the filing of the motion for a summary judgment, plaintiffs amended par. 9 of their complaint so as to allege lack of authority of the Federal Reserve

Bank to execute the release. As amended par. 9 of the complaint read:

> "9. On or about December 22, 1945, the defendant, purporting to act as fiscal agent of the United States, but without authority in law so to do and for a grossly inadequate consideration executed an agreement reciting that in pursuance to an agreement made prior to the sale of the subdivision property, it had released and discharged the realty from the lien or encumbrance of the agreement dated January 16, 1945, by which the Realty Corporation agreed and bound itself to execute in favor of the defendant, on demand, as security for the balance of the indebtedness of the Village Corporation, a mortgage covering the subdivision subject only to the F. H. A. insured mortgages outstanding on the individual dwelling units thereon."

The Decision of the District Court.

The district court sustained the motion of the defendant for a summary judgment. In its Memorandum opinion, the court directed the entry of an order reciting that the disposition of the motion was based upon the pleadings and exhibits in this action and upon the entire record in the prior case of **United States v. Joseph W. Hart and J. Carl Russell.**

In the Memorandum, the court stated that while the claims and causes of action in this action and the prior action are different, the doctrine of collateral estoppel precluded relitigation between the same parties of issues which were actually litigated and determined in a prior action. Analyzing the complaint in this action, the court, among other things, said:

> "It is clear that the question as to whether the property was sold at a sacrifice was actually litigated

adversely to the plaintiffs in the prior litigation. It was specifically found both by this Court and the Court of Appeals that the price, $37,140.00 was fair and adequate and that the sale was made in good faith. Consequently, this issue cannot be re-examined in the present case as the basis for a claim by the plaintiffs against the Federal Reserve Bank, acting merely in the capacity of a fiscal agent for the United States."

The lower court held that the parties in the two actions are the same "since the Federal Reserve Bank was acting merely as the fiscal agent of the United States."

While holding, in its Memorandum, that the Federal Reserve Bank was clothed with sovereign immunity from suit, the court below did not dismiss this action on the ground that it was a suit against the sovereign without its consent.

The Affirmance by the Court of Appeals.

The Court of Appeals affirmed the decision of the District Court holding that the authority of the Federal Reserve Bank of Atlanta to guarantee the payment of 90% of the balance of the indebtedness and to release the security given to the banks by the principal obligor, Country Club Village Corporation, was conferred by paragraph 3 of Executive Order No. 9112 which, it said, was ratified by Sec. 7 of 56 Stat. 351, enacted June 11, 1942.

ARGUMENT.

The Applicable State Law.

The contracts of pledge were made, executed, and to be performed in the state of Alabama, and the rights of the parties were governed by the law of that state. **Hiscock v. Varick Bank, 206 U. S. 28, 27 S. Ct. 681, 51 L. ed. 945.**

It is a settled rule in Alabama that a mortgagee who has exercised a power to sell at a **private sale** is chargeable in equity upon a bill for an accounting and redemption, with the reasonable value of the property sold, regardless of the price actually received. **De Moville v. Merchants & Farmers Bank, 237 Ala. 186 So. 704, 713; Murphy v. Merchants National Bank of Mobile, 240 Ala. 688, 200 So. 895, 904; Marsh et al. v. Elba Bank & Trust Co., 221 Ala. 683, 130 So. 323; Zadek v. Burnett, 176 Ala. 80, 57 So. 47, 450; Johnson v. Selden, 140 Ala. 418, 37 So. 249, 103 Am. St. R. 49. Harmon v. Dothan Nat. Bank, 186 Ala. 360, 64 So. 621.**

In **Mahone v. Williams, 39 Ala. 202, 217,** the Alabama Supreme Court declared:

> "It is the primary duty of one charged with making a sale, to adopt the mode which will probably command the best price, and to exercise his best judgment in determining what is the mode likely to accomplish that end; and a sale in a manner variant from that which was known to be most likely to produce the largest price, would be sufficient reason for avoiding the sale. So, also, a failure to sell in the mode which a reasonable exercise of the seller's judgment would have shown to be the most probable means of bringing the largest price, would be a good ground of objection to a sale, where the price is altogether inadequate."

Where the lands are in "separate parcels, distinctly marked for separate and distinct enjoyment," there is a "reasonable presumption, sanctioned by observation and experience, that such property will produce more when sold in parcels than en masse, because the sale is thus accommodated to the probable wants of the purchasers." **Dozier v. Farrior, 187 Ala. 181, 65 So. 364.**

In **Bank of New Brockton v. Dunnavant, 204 Ala. 636, 87 So. 105,** the Alabama Supreme Court said:

> "Somerville, J. The Allegations of the bill present two distinct theories upon which the right of redemption is grounded: (1) That the foreclosure sale under the power is voidable at the instance of the mortgagee because the two farms, which are separate and distinct in location, equipment, and use, were sold en masse, which was highly disadvantageous and injurious to the mortgagor; that the mortgagee was the only bidder; and that the price of $5,517.45, which was bid and paid for the entire property, was grossly disproportionate to its real value, which was not less than $20,000; and (2) . . . In a court of law a power of sale is merely part of a legal contract to be executed according to its terms. In a court of equity it is quickened with the elements of a trust, and the donee of the power is charged as a quasi trustee with the duty of fairness and good faith in its execution, to the end that the mortgagor's property may be disposed of to his pecuniary advantage in the satisfaction of his debt." Harmon v. Dothan Nat. Bk., 186 Ala. 360, 369, 64 South 621, 624. To the same effect is Dozier v. Farrior, 187 Ala. 181, 65 South. 365, cited in note, L. R. A. 1917B, 527, 528.
>
> In Dozier v. Farrior, supra, it was held that a sale, under the power of widely separated tracts,

devoted to separate and distinct uses, made en masse, and bringing for the property a price greatly less than its real value, would be set aside in equity, letting the mortgagor in to redeem. In this aspect of the bill its allegations are sufficient to authorize the relief prayed, and the demurrer was properly overruled. We do not overlook respondent's contention that the mortgagee's equitable duty in the premises was abrogated by that provision of the power which authorized a sale "when, as, and where it shall seem best to them, for cash or on credit." A court of equity, however, will not allow the mere latitude of the mortgagee's discretion—a specific mode not being prescribed—to nullify a duty enjoined by law as essential to the ends of justice, and constituent in the obligations of a trust. As said by the Supreme Court of Illinois in a similar case:

"The power given, by its very terms, implies that the trustee assumed the duty of thinking on the subject, and that he should adopt that course which he should think would secure a good price. It does not mean that the trustee may do as he may please, or that he may do that which should be the most convenient for him." Cassidy v. Cook, 99 Ill. 385, 388.

In **Johnson v. Selden, 140 Ala. 418, 37 So. 249, 103 Am. St. R. 49,** it was held that the sale of property in lump or en masse was in itself prima facie evidence of unfairness. The Alabama Supreme Court stated:

". . . Here the property, which consisted of different items, such as mules, wagon, carriage, and farm products, was sold en masse, or in lump. This, in itself, was prima facie evidence of unfairness: Jones on Chattel Mortgages, 4th ed., p. 781, Sec. 797. The question of value was one for the jury."

See Annotation: Amount of Property Sold Under Mortgage Foreclosure in **L. R. A. (N. S.), 1917B, pages 517, 526-7.**

Petitioners (plaintiffs below) in their complaint alleged:

13. Plaintiffs further aver that the defendant participated in making the sale of the assets and property held by the pledgees for the security of the indebtedness of the Village Corporation resulting in a wanton sacrifice of the security and property. After the sale to Spring Hill Homes, Inc., for only $37,140.00, the purchaser, according to the records of Mobile County, Alabama, sold off the individual houses for amounts sufficiently above the amounts of the F. H. A. insured first mortgages to realize profits as follows:

For the period ending 12/31/45	$ 19,387.28
1/1/46 to 8/16/46	157,350.85
8/16/46 to 12/31/46	73,345.78
1/1/47 to 8/16/47	56,553.65
8/16/47 to 12/31/47	61,585.45
In the calendar year 1948	10,615.55
1949 through 1957	4,950.00
Total	$383,988.56

Said sale was not made in good faith but was fraudulently contrived by the banks and the defendant to give the property to one favored by them (for undisclosed reasons) at a fraction of its value and so as to extinguish the statutory right or redemption of two years under the laws of Alabama, which was a valuable right belonging to the Village Corporation, the original mortgagor (and consequently, to plaintiffs who were the equitable owners of the property, according to the laws of Alabama.)

14. . . . Plaintiffs aver that had the defendant and the banks exercised ordinary good judgment in the management of the security by collecting the rentals therefrom and by complying with the laws of Alabama, the entire indebtedness would have been paid in full. The estimated value of the houses and improvements, according to Federal Housing Administration appraisals, was in excess of the amount of the banks' indebtedness and the purchaser of the subdivision, as has been shown, realized a profit far in excess of the F. H. A. estimated values.

"15. Plaintiffs aver that the defendant as pledgee succeeding to the duties in part of the two banks occupied a fiduciary or trust relationship towards the plaintiffs and was under a duty to manage the security and property of the Village Corporation for the best interests of the plaintiffs as well as the United States of America. . . .

. . . . . .

Wherefore, plaintiffs demand:

a) Judgment against the defendant for the value of their stock in Country Club Village Corporation at the time of the sale of the subdivision property to Spring Hill Homes, Inc., less the amount received from said purchaser, together with interest from the date of said sale to Spring Hill Homes, Inc.; and all costs of the action.

b) All such further and general relief as is just."

The banks through their control of the corporation holding the title sold all 413 houses subject to the F. H. A. guaranteed mortgages on the individual houses at a private sale without notice to the guarantors, Hart and Russell, and, without any notice to the public. A specific mode of realization upon the pledge was not prescribed. The banks and the federal reserve bank evidently pre-

sumed from the want of any such specification, that they could deal with the subdivision property as they pleased. But, if so, they were laboring under a very serious mistake or misconception as to the law of Alabama. For, in **Bank of Brockton v. Dunnavant**, *supra*, the provision of the power which authorized the sale, "when, as, and where it shall deem best for them, for cash or on credit," was about as broad as the mind can conceive. The Alabama Supreme Court, however, held that a court of equity will not allow there mere latitude of the mortgagee's discretion—a specific mode not being prescribed—to nullify a duty enjoined by law as essential to the ends of justice, and constituent in the obligations of the trust.

The law declared by the Alabama Supreme Court in **Bank of Brockton v. Dunnavant**, *supra*, is, of course, hornbook law. In **Pauly v. Trust Co., 165 U. S. 606 at page 620, 17 S. Ct. 465, at page 470, 41 L. ed. 844**, Mr. Justice Harlan said:

> "That the pledgee of personal property occupies towards the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor."

Dibert v. Wernicke (C. A. 6th), 214 Fed. 673, lays down the rule that a mere literal compliance by the pledgee with the terms of the pledge, was not sufficient to render valid its sale and purchase of the pledged property.

Clearly, the allegations in the complaint in the case at bar that the federal reserve bank and the two Alabama banks, through their dummy directors and officers of the Realty Corporation, made a private sale of the **entire subdivision** to a man named Ellinor for $37,140.00, allowing him to give a check against uncollected funds, that after the sale (on October 2, 1945) the purchaser (Spring Hill Homes, Inc.) sold off the individual houses for amounts

sufficiently above the amounts of the F. H. A. insured first mortgages to realize profits of $19,387.28 for the period ending Dec. 31, 1945 and $157,350.85 for the period from Jan. 1, 1946 to Aug. 16, 1946 by Alabama law state a cause of action for breach of the fiduciary duty of fairness and good faith in the execution of the power conferred by the pledge agreement to the end that the property be disposed of to the pecuniary advantage of Country Club Village Corporation and Hart and Russell, the guarantors of its indebtedness.

By Alabama law, as has been shown, the mere fact that the sale of the subdivision was in lump or en masse is prima facie evidence of unfairness.

Former Judgment No Bar.

The Court of Appeals in its opinion said that the district court held that all but one of the specific issues raised by the complaint had been decided in the prior case and the doctrine of collateral estoppel was applicable.

Petitioners would show to the Court that the Court of Appeals in the prior case decided merely that the evidence adduced by the defendants Hart and Russell of offers by other parties to purchase the entire subdivision in lump or en masse did not rebut the prima facie case made by the certificate of indebtedness of the General Accounting Office showing the balance of indebtedness owing and that they did not carry the burden of "substantially proving" the defense of bad faith dealings on the part of the banks "with the government's assent." The point that by the law of Alabama the sale of the entire 413 houses in lump or en masse was prima facie evidence of unfairness, was not raised in the former case.

In **DeSollar v. Hanscome, 158 U. S. 216, 221, 15 S. Ct. 816, 39 L. ed. 956,** it was declared:

"Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment."

Does the judgment in the former case that the defendants failed to carry the burden of "substantially proving" the defense of bad faith dealings on the part of the banks negative the facts upon which petitioners base their cause of action against the federal reserve bank—a different cause of action from the suit by the United States on the note?

In **Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. 76, 33 S. Ct. 995, 57 L. ed. 1398,** this Court stated:

"The litigation, though between the same parties, is upon an entirely different cause of action. The bar of the former judgment is therefore confined to the questions which were actually litigated and decided in the former case, and it devolved upon the city to show in support of its plea, the cause of action being different in the present case, that the point here in issue was adjudged in the former case. DeSollar v. Hanscome, 158 U. S. 216, 39 L. ed. 956, 15 St. Ct. 816; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179, 30 S. Ct. Rep. 78."

The district court did not find that the prima facie evidence of unfairness arising from the fact of the private sale of the entire subdivision in lump or en masse was rebutted by any **evidence.** Yet, under the rule stated in **Owensboro v. Cumberland Tel. & Tel. Co.,** *supra,* it devolved upon the federal reserve bank to show that this prima facie evidence of unfairness was satisfactorily rebutted. Otherwise the plea of former adjudication was not supported. It could not be aided by any presumption or argument from the former judgment. There was no presumption that the federal reserve bank and the two Alabama banks properly performed the duty of thinking

on the subject of what manner of sale would secure the best price and deemed that it was for the best interest of all parties concerned, i. e., the banks, the United States and the individual guarantors, Hart and Russell, to sell to Ellinor for a mere fraction of the value of the subdivision as estimated by Federal Housing Administration, but a short time before.

If any presumption could be drawn from the facts, it is one that is highly unfavorable to the defendant federal reserve bank. In neither the prior suit, nor in the case at bar, was any evidence produced by the government or by the federal reserve bank to show the reasons which impelled the private sale in lump or en masse.

Certainly, the federal reserve bank is not in position to insist upon a presumption that it performed its duty because it has, through the Justice Department, successfully avoided answering interrogatories propounded by petitioners in both suits directed to this precise point of the reasons which caused it to sacrifice the property. In the prior suit, Hart and Russell propounded interrogatories to the government, one of which was:

> "**Interrogatory No. 9.**—State specifically whether or not there were at least 400 houses in the Country Club Village, each having a fair value of from $1,000.00 to $1,200.00 in excess of the mortgage on each house and that said houses were sold for at least this amount by the said Ellinor within a short period of time after the property was conveyed to him and whether or not any accounting of profits was required by the said Ellinor."

The answer to this interrogatory signed by an assistant district attorney admitted that there were 413 homes in the project, but stated that "Plaintiff (United States of America) had no knowledge of their market value, or of the other matter inquired of in this interrogatory".

In the present action, petitioners propounded interrogatories to the then Attorney General of the United States, calling upon him to make an examination of the files of the War Department and Federal Reserve Bank of Atlanta

> ". . . and state your conclusion whether or not said sale was made in good faith, for a full, adequate and fair consideration and in the best interests of the United States of America, giving reasons for your conclusion."

Upon ex parte application of the United States District Attorney, the district court extended the time for objecting and/or answering the interrogatories until ten days after the ruling of the court on the defenses raised by the district attorney (appearing presumably under the direction of the Attorney General) in the motion for a summary judgment.

By other interrogatories filed in the present action, petitioners called on the federal reserve bank for the following information:

> "**Interrogatory No. 1.**—Please file and make available for inspection and copying all reports, communications, memoranda, letters, appraisals, documents and other writings in any way pertaining to the sale of the Country Club Village property to Spring Hill Homes, Inc., or L. B. Ellinor; or at your election, attach photocopies of same to your answer hereto.
>
> **Answer:**
>
> **Interrogatory No. 2.**—Is Mr. V. K. Bowman still connected with Federal Reserve Bank of Atlanta? If not, please give his address.
>
> **Answer:**
>
> **Interrogatory No. 3.**—Do you have among your papers and files, a copy of any report or appraisal of

Country Club Village Subdivision made by Federal Housing Administration? If so, please attach a copy thereof to your answer.

Answer:

.....

Attorney for Plaintiffs."

The interrogatories were never answered, for the reason that on ex parte application of the United States Attorney, the district court ordered that the time allowed to the federal reserve bank by Rule 33 of the Federal Rules of Civil Procedure to object or answer be extended to 30 days after the court shall have ruled on the validity of the affirmative defenses raised by the defendant federal reserve bank in its answer.

Petitioners, prior to the ruling of the district court sustaining the motion of the federal reserve bank for a summary judgment, moved to vacate the orders staying the discovery sought by their interrogatories upon the ground that they verily believed that the discovery sought would show that the defense of res judicata was not available to the defendant but this motion, too, was denied by the district court.

In **Cosby v. Buchanan, 23 Wall. 420, 23 L. Ed. 138,** this Court said:

> "Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud."

In **The New York, 3 Wheat. 59, 4 L. Ed. 33,** it was held that the failure of one who has committed an act which unexplained is a violation of law, to bring forward material evidence which is in his possession of witnesses who are in his power and who are acquainted with all the circumstances of the case, is ground of suspicion and distrust. Cf. **Mammoth Oil Co. v. U. S., 275 U. S. 13, 48 S. Ct. 1, 72 L. ed. 137.**

It will be noted that the Court of Appeals, in its opinion, did not make a finding of its own that all of the issues raised by the complaint had been decided by its judgment and opinion in the prior case. It merely said that the district court, in its opinion held that all issues had been decided and that the doctrine of collateral estoppel was applicable. Neither court below could point out any evidence in the record of the prior suit or the present one which so much as tends to show that the banks and the federal reserve bank, after taking due care and thinking upon the subject of how to realize the most from the 413 houses in the subdivision to pay the balance of the indebtedness owing to the United States 90% and the two Alabama banks a mere 10%, and for Hart and Russell, too, made an honest and good faith decision that it was best to sell the property privately in lump to Ellinor or Spring Hill Homes, Inc.

After staying the answer to all of the plaintiffs' interrogatories that would have revealed the facts about the sale and the reasons why the subdivision was sold in lump, the district court, in its memorandum, said:

> ". . . It is clear from the agreement that a broad discretion is vested in the banks (assignors of Federal Reserve) with reference to enforcement of collateral and as to questions of sale and foreclosure, and the allegation that Federal Reserve during this period prevented sales to individual home owners, standing alone, and in the context of the facts as they existed, amounts to nothing more than a decision made by the Bank in the proper exercise of discretion, not to continue after default in liquidating collateral to sell lots separately but to sell all of the remaining real estate as a whole."

As petitioners have shown, the rule in Alabama is that *prima facie* the decision not to sell the lots separately

was an improper exercise of discretion by the federal reserve bank. This prima facie case could only be rebutted by evidence.

Petitioners, therefore, say that the former judgment is not conclusive of the question of the validity of the sale of the subdivision. All that was decided was that Hart and Russell did not carry the burden of "substantially proving" that the sale price of $37,100.00 was not the reasonable value of the property, and that the legal presumption. According to the law of Alabama, of unfairness of the sale arising from the fact that the 413 houses were sold privately in lump is unrebutted by any evidence in the record in the two cases. Therefore, the precise point in issue was not adjudged in the former case and the issue of the fairness of the sale remains at large for determination on evidence in the present case.

Actions of Federal Reserve Bank Unauthorized by Law—Privity With United States of America Lacking.

Another reason why the federal reserve bank is not entitled to invoke the judgment in the prior suit in which the United States of America sued the guarantors, Hart and Russell, is that it does not stand in any privity relationship with the United States.

In **Case of Tweed, 16 Wall. 504, 21 L. Ed. 389,** this Court declared:

> "Whenever a person sued sets up a defense that he was an officer of the government acting under color of law, it plainly devolves upon him to show that the law he invokes authorized the act in question to be done, and that he acted in good faith; . . ."

The Court of Appeals held that paragraph 3 of Executive Order No. 9112 authorized the Federal Reserve Bank

of Atlanta "to take such action as it did and of which complaint is made herein." Complaint is made first that the federal reserve bank was not authorized to execute the guarantee agreement as fiscal agent of the United States of America on behalf of the War Department.

The purpose of Executive order No. 9112 of March 26, 1942 was to authorize the War and Navy Departments and the Maritime Commission to guarantee loans to provide working capital for armament contractors and subcontractors. No authority was conferred upon these three agencies or departments to guarantee loans for housing. Executive Order No. 9070 of February 24, 1942 had consolidated the housing agencies and functions of the Government into the National Housing Agency.

As stated in the Guarantee Agreement executed by the federal reserve bank, the loan made by the two Alabama banks to Country Club Village Corporation was for the following purposes:

> ". . . to finance Borrower in the construction of 425 single family dwelling units with other improvements, including streets, water distribution systems, and power lines; said dwelling units to be located on a tract of land situate in Mobile County, Alabama, on Old Shell Road near Springhill."

The only authority which any agency of the government had to guarantee a loan for such purpose was that conferred by the National Housing Act Amendment, Ch. 319, 77th Cong., 2d Sess., Approved May 26, 1942—56 Stat. 301 authorizing the Federal Housing Administrator to insure mortgages on property designed for rent for residential use by war workers where the principal obligation did not exceed $5,000,000.00 or 90 per centum of the amount which the Administrator estimated would be the reasonable replacement cost of the completed property or project.

The Court of Appeals did not state **expressly** that Executive Order No. 9112 conferred authority upon the War Department to guarantee loans for housing, such as the one made by the two banks to Country Club Village Corporation. It said that Sec. 7 of 56 Stat. 351, approved June 11, 1942, ratified "the grant of authority given the War Department under this executive order." This, of course, left undecided the question—if any question could reasonably be said to exist—as to what actually was the grant of authority to the War Department by Executive Order No. 9112.

A mere perusal of Sec. 7 of 56 Stat. 351 approved June 11, 1942 (the Mobilization of Small Business Act) makes it clear beyond the peradventure of doubt that Congress well understood that the purpose of Executive Order No. 9112 was to authorize the three agencies named therein to guarantee loans made pursuant to the Mobilization of Small Business Act "with a view to increasing the production of war materials, supplies, or equipment." Congress by Section 7 of the Act further authorized the agencies to use any funds "heretofore or hereafter made available to them for purposes of procuring war materials, supplies, and equipment, or of expediting the production thereof."

There is no mention of defense housing in either Executive Order No. 9112 or the Mobilization of Small Business Act. The authority for insuring loans for defense housing was conferred upon the Federal Housing Administrator by other legislation and Executive Order No. 9070.

The Board of Governors of the Federal Reserve System on April 10, 1942 announced the adoption or Regulation V to carry out the President's Executive Order No. 9112 of March 26, 1942, for the purpose of facilitating and expediting the financing of war production. In a statement for the Press, the Board of Governors stated that the

regulation was adopted after consultation with the War Department, the Navy Department, and the United States Maritime Commission and said:

> "Under the Executive Order the three military procurement agencies are authorized to guarantee commercial banks, Federal Reserve Banks, the Reconstruction Finance Corporation, or other financial institutions **against loss on loans made to concerns to finance the performance of war orders**..." (Emphasis added).

Federal Reserve Bulletin, May 1942, pages 424-427.

Nothing could be plainer than that the only authority for guaranteeing loans for defense housing was that conferred by the Amendments to the National Housing Act and that Congress did not intend to confer authority upon the War Department to guarantee such loans. The liaison officer of the War Department stationed at the Federal Reserve Bank of Atlanta who signed the Statement of Necessity for the guarantee of the loan to Country Club Village Corporation of course, did not have the power to authorize Federal Reserve Bank of Atlanta to disregard the laws enacted by the Congress.

Want of Authority in Federal Reserve Bank of Atlanta to Release Lien to Allow Private Sale of Subdivision to be Made.

As Executive Order No. 9112 conferred no authority on the federal reserve bank to act as fiscal agent of the United States executing on behalf of the War Department a guarantee of a loan for residential housing, even though it be called "defense housing", it could not furnish the basis for an **implied** power to receive and enforce any rights to collateral securing such an unauthorized loan. Yet, par. 3 of Executive Order No. 9112 was cited by the Court of

Appeals as authorizing the federal reserve bank "to take such action as it did."

Petitioners do not deem it necessary to cite the numerous decisions of this Court upholding and enforcing the rule that the powers of governmental representatives are created, defined and limited by legislation and no act by an agent exceeding his legislatively delegated authority constrains the United States. Even if the federal reserve bank were an officer of the government acting under color of law—and we have shown that neither proposition is sustainable in the case now before the Court—in this action by individuals for injury occasioned by its acts, according to the rule declared in **Case of Tweed**, *supra*, it plainly devolves upon it to show that the law it invokes authorized the release of the lien upon the subdivision to allow the private sale to be made. This has not been done in the case at bar.

In **American Sales Corporation v. United States (C. A. 5th), 32 F. 2d 141**, affirming **U. S. v. American Sales Corporation, 27 F. 2d 389**, and cer. den. **American Sales Corporation v. U. S., 280 U. S. 574, 50 S. Ct. 29, 74 L. ed. 625**, the statutes were held to empower the Secretary of War to contract for the sale of surplus war materials, retaining in the government possession and title until the price was paid. But, it was held that where the Secretary made such contracts which were partly executed, he was without authority to release rights vested in the government by those contracts by reducing the contract price. The authority to make the original contracts, the court said, did not imply authority to cancel them or to relinquish rights thereby acquired.

Doctrine of Sovereign Immunity Not Available to Federal Reserve Bank.

The federal reserve bank, of course, is not an officer or agency of the United States. Even Federal agencies or instrumentalities do not acquire the government's immunity from suit merely because they do its work. **Keifer v. R. F. A., 306 U. S. 381, 59 S. Ct. 516, 83 L. ed. 784.** The power to grant or withhold immunity from suit on behalf of a government corporation is in Congress. **Brady v. Roosevelt S. S. Co., 318 U. S. 575, 63 S. Ct. 425, 87 L. ed. 471.**

Assuming that Congress would have had the power to grant immunity to federal reserve banks for any action taken pursuant to Executive Order No. 9112, it did not do so by the "Act for the Mobilization of Small Business for War Production" or any other statute. If what was done was within the authority conferred upon the War Department by Sec. 7 of the Act, the Federal Reserve Bank would have been under no liability anyway, because there is no liability on the part of a public officer for executing the will of Congress.

We cannot assume that Congress would pass a law limiting the authority of an agency to do certain things and, by the same act, undertake to confer an unlimited immunity against any liability for acts done in excess of the authority granted and even for fraud. Neither can we assume that the President, whose authority is limited to enforcement of the laws enacted by the Congress, not to making them, would presume to grant an immunity from liability for acts done in excess of authority and in fraud upon the United States and third persons. An overtowering public policy which makes an agent liable for for his own negligence or fraud has been so long embedded in the law as to forbid such a construction of Executive Order No. 9112.

Surely, it would be unsound reasoning to hold that Federal Reserve Bank was carrying out its proper functions because the President, by the executive order, directed that in guaranteeing loans as agents of the War Department, the federal reserve banks would be exempt from personal liability even though the loans were outside the scope of any authority conferred upon the War Department. That an attempted grant of immunity from liability should operate as a grant of authority contrary to the expressed will of the Congress would be a novel doctrine.

The only reasonable interpretation that can be given the exemption from liability clause in the executive order is that federal reserve banks executing guaranties as agent for the three agencies named in the order were not to be personally liable for payment to the obligees. To construe the provision otherwise would be to hold that the President intended to circumvent the will of the Congress and assume law-making authority to set aside an ancient and time honored rule of law and fundamental public policy.

For the reasons shown, Par. 3 of Executive Order No. 9112 does not operate to clothe the Federal Reserve Bank of Atlanta with the immunity of the sovereign for the acts done by which complaint is made herein.

It has been shown that the implication in the opinion of the district court which the Court of Appeals expressly approved that the federal reserve bank was "carrying out its proper functions in complying with its statutory obligation as an insurer of 90% of the Hart and Russell indebtedness, and in receiving and enforcing all rights to collateral security after payment" is without foundation or warrant in law.

Since what was done by the Federal Reserve Bank was not within the authority validly conferred by the Congress, it is responsible to the full extent of the injury caused thereby. **Herd & Co. v. Krawill Machinery Corp., 359**

U. S. 297, 3 L. ed. 2d 820, 79 S. Ct. 766; Brady v. Roosevelt S. S. Co., 317 U. S. 575, 63 S. Ct. 425, 87 L. ed. 471; Sloan Shipyards Corp. v. United States S. Bd. E. F. Corp., 258 U. S. 549, 567, 66 L. ed. 762, 42 S. Ct. 386. Petitioners should be given the opportunity to prove the allegations of fraud. If the Federal Reserve Bank acted fraudulently, as alleged, it would be liable in damages to them and the United States. **Lee v. Monroe and Thornton, 11 U. S. 366, 3 L. ed. 373.**

REASON RELIED ON FOR GRANTING THE WRIT.

In holding that the Federal Reserve Bank of Atlanta was clothed with the immunity of the sovereign from liability for acts which by applicable state law were in flagrant violation of the duty of a fiduciary and by rulings barring any investigation of its conduct, the courts below have nullified the public policy requiring strict accountability of every agency or agent handling public funds and property and the rule declared by this Court in **Case of Tweed** imposing upon one claiming to act as an officer of the government under color of law the duty of showing that he acted in good faith.

PRAYER.

Wherefore, petitioners pray that a writ of certiorari issue from the Honorable Court; and that the judgment dismissing this action be reversed and the case remanded for trial in the district court according to the usual course of such proceeding.

This October 18, 1967.

.....

FYKE FARMER,
511 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioners.

APPENDIX.

(Filed Jan. 15, 1963, Carl W. Reuss, Clerk)

No. 14955.

United States Court of Appeals
for the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. Joseph W. Hart and J. Carl Russell, Defendants-Appellants.	Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided January 15, 1963.

Before: Cecil, Chief Judge, Miller, Circuit Judge, and Boyd, District Judge.

Boyd, District Judge. The government sued the defendants-appellants herein for $83,900.63 plus interest, the balance allegedly owing on a loan contracted with two certain banking institutions, the payment of which the appellants had unconditionally guaranteed. The claim herein against the appellants had been assigned by the aforesaid banks to the government after the latter had paid on its own guaranty of 90% of the obligation. The government's guaranty was executed pursuant to Executive Order 9112, issued under authority of the First War Powers Act of 1941. The only issue found to be deserving of discussion on this appeal is whether in this non-jury case the District Court erred in relying on certain evidence concerning proof of

value of real property in rendering judgment against the appellants. The issue arises as incidental to the main question of whether the sale of said real property by the government's assignors, the banks, was a good faith transaction.

* * * * * * * *

Hart, et al. v. Fed. Res. Bk. of Atlanta No. 17170.

* * * * * * * *

Bank of Atlanta, the appellee herein. The United States then brought an action in the District Court against Hart and Russell on their guarantees. The court granted judgment to the United States, 215 F. Supp. 35, and this Court affirmed, 312 F. 2d 127. The appellants then brought this action in the District Court against the Federal Reserve Bank.

The cause of action centers on two basic claims, one, that the appellants were induced to sign an agreement under date of April 6, 1944, through false representations made by the banks and, two, that the Federal Reserve Bank mismanaged the collateral security and caused the security to be sold for less than its actual value to the damage of the appellants.

District Judge William E. Miller granted summary judgment to the Federal Reserve Bank and this appeal followed. Judge Miller wrote an excellent opinion in which he held that all but one of the specific issues raised by the complaint had been decided in the prior case and that the doctrine of collateral estoppel was applicable. He held that the claim that the Federal Reserve Bank prevented sales to individual home owners was vague and general and insufficient to state a claim against the Federal Reserve Bank which would not be precluded under the doctrine of sovereign immuni[illegible]. The facts are fully stated in the opinion of Judge M[illegible]r. We agree with the opinion of Judge Miller in its en[illegible]ty.

After the motion for summary judgment was filed, counsel for the appellants moved to amend the complaint by alleging in effect that the Federal Reserve Bank was without authority as fiscal agent of the United States to guarantee the payment to the banks of 90 percent of any deficiency and to act as it did in relation to the transaction. The district judge allowed the amendment but did not specifically comment on it in his opinion.

Under this amendment, appellants challenge the following statement in the opinion of Judge Miller:

> "Since the Reserve Bank was merely a fiscal agent of the War Department under the First War Powers Act of 1941, it would be clothed with the immunity of the sovereign in carrying out its proper functions in complying with its statutory obligation as an insurer of 90% of the Hart and Russell indebtedness, and in receiving and enforcing all rights to collateral security after payment."

It is provided in paragraph 3 of Executive Order No. 9112 under the First War Powers Act of 1941 that,

> "Any Federal Reserve Bank * * * is hereby authorized to act, as agent of the War Department * * * in carrying out any of the provisions of this executive order, and the Secretary of the Treasury is hereby directed to designate each Federal Reserve Bank to act as fiscal agent of the United States pursuant to the provisions of section 15 of the Federal Reserve Act in carrying out any authority granted to it by or pursuant to this executive order. * * * In taking any action under any designation or authority given by or pursuant to this paragraph no Federal Reserve Bank shall have any responsibility or accountability except as agent of the War Department * * *"

Section 7 of 56 Stat. 351, enacted June 11, 1942, ratified the grant of authority given the War Department under this executive order.

We conclude that the Federal Reserve Bank of Atlanta was authorized to take such action as it did and of which complaint is made herein and that there is no error in the above quoted clause of the district judge's opinion.

Judge Miller did not reach the government's claim that the action was barred by the statute of limitations, nor do we.

The judgment of the District Court is affirmed upon the opinion of Judge Miller. (Joseph W. Hart et al. v. Federal Reserve Bank of Atlanta, ... F. Supp. ....)

United States of America
vs.
Joseph W. Hart and J. Carl Russell.
} Civil Action No. 2299.

MOTION OF THE DEFENDANTS—FILED AUG. 24, 1965.

Come the defendants, Joseph W. Hart and J. Carl Russell, by their attorney Fyke Farmer, and respectfully show to the Court that they are unable to pay the judgment rendered against them in favor of the United States of America but have brought an action against the Federal Reserve Bank of Atlanta in this Court the style of which is **Joseph W. Hart, Luella F. Hart and J. Carl Russell v. Federal Reserve Bank of Atlanta, Civil No. 3337,** asserting a cause of action against the Federal Reserve Bank of Atlanta as regards which the United States of America has a joint interest with them in recovering from Federal Reserve Bank of Atlanta the loss sustained as the result of the unauthorized and wrongful acts of the Federal Reserve Bank of Atlanta in releasing the security for the note on which the United States of America recovered the judgment against them in this case and should, therefore, join with the plaintiffs

in said **Case No. 3337** on the same side as the plaintiffs against the Federal Reserve Bank of Atlanta and by so doing render unavailable to the defendant Federal Reserve Bank of Atlanta the defenses of *res adjudicata* laches and the statute of limitations and governmental immunity; and the defendants move the Court to take judicial notice of the entire proceedings in said **Case No. 3337** and enter an order herein requiring the United States of America to show cause why it should not join as plaintiff in said **Cause No. 3337** or be forever barred from collecting, or attempting to collect, the judgment against the defendants in this cause.

.....

Attorney for Defendants.

In the

District Court of the United States
for the Middle District of Tennessee,
Nashville Division.

Joseph W. Hart, Luella F. Hart and J. Carl Russell,

v.

Federal Reserve Bank of Atlanta.

Civil No. 3337.

MEMORANDUM—FILED JAN. 13, 1966.

This case is before the Court on a motion for summary judgment by defendant, Federal Reserve Bank of Atlanta. The specific points raised and pleaded in the motion are that (1) plaintiff, Luella F. Hart, is not a proper party plaintiff; (2) the questions now presented have been previously decided and that this action is therefore barred under the doctrine of res judicata; (3) the action is barred by laches and the statute of limitations; and (4)

the action will not lie because of the doctrine of sovereign immunity.

In 1943, in order to finance a development known as Country Club Village Subdivision, Country Club Village Corporation executed a promissory note to the First National Bank of Birmingham for $2,200,000. Plaintiffs, Hart and Russell, the principal stockholders of the Corporation, signed the note as guarantors. Plaintiffs executed an agreement dated April 6, 1944 which required them to deposit the capital stock of the Corporation. In addition, the Corporation executed and pledged an additional note for $2,200,000 payable on demand, this note being secured by real estate and chattel mortgages covering all its properties. Pursuant to these financial arrangements, Country Club Village Corporation completed construction of the development.

Plaintiffs allege that the two banks, using the power of the pledge, forced them to sign the agreement of April 6, 1944. They further allege that they were induced to sign the agreement by representations that if they did sign and did turn over the stock of the Village Corporation, they would not have to honor their guaranty of the Village Corporation's indebtedness.

The 1944 Agreement provided that stock of the Country Club Village Corporation would be conveyed to the banks who would hold it free and clear of all claims of Hart, his wife, Mrs. Luella Hart, and Russell. Qualifying shares were given to Hart and Russell who were to act as managers of the Country Club Village corporation. It was further provided that although the liabilities of the Country Club Village Corporation exceeded its assets, Hart and Russell were to have the right to redeem the stock by payment of the indebtedness within one year. At the same time, the banks were given the power to accept an offer to buy the Corporation. In accepting any offer within

the one year period, however, it was provided that the banks were to exercise their best judgment and discretion. Furthermore, before accepting any offer, the banks were to submit written notice to Hart and Russell. The power to sell i. e., accept an offer, was limited to one year from the date of the Agreement at which time Hart and Russell were to have no further rights in the stock of the Country Club Village Corporation or any successor corporation.

Subsequent to the 1944 Agreement, the banks organized the Country Club Realty Corporation by issuing the capital stock of that corporation, except for qualifying shares for Hart and Russell, to the Country Club Village Corporation. The Village Corporation then transferred its property to the Realty Corporation and the banks released the real and chattel mortgages which they held as collateral against the Village Corporation's indebtedness. The Banks then obtained from the Realty Corporation an agreement to execute new mortgages on demand subject only to F. H. A. insured first mortgages to be placed on the individual homes.

F. H. A. Mortgages, totaling over $2,000,000, were placed on the homes and the net proceeds were received by the banks and applied to the Village Corporation's indebtedness. A deficit of $183,345.55 remained. The banks demanded payment for 90% of this deficit, and the Federal Reserve Bank of Atlanta, fiscal agent of the United States, made the payment pursuant to its guaranty agreement made some time in October, 1944.

Plaintiffs then allege that in the course of the year following the agreement of April 6, 1944, the defendant prevented any sales of homes within the Subdivision. It is further asserted that the banks refused several offers for the Subdivision as a whole. At the expiration of the one

year period specified in the April 6, 1944 Agreement the defendant and the two banks sold the Subdivision to Ellinor for $37,140.00. The Subdivision was then conveyed by the Realty Corporation to Spring Hill Homes, Inc., the corporation designated by Ellinor to take title to the Subdivision. The banks then assigned the principal note to the defendant, Federal Reserve Bank, together with the capital stock of the Village Corporation and all interests in collateral.

Subsequently, on or about December 22, 1945, the defendant, pursuant to an agreement made before the sale, released the Realty Corporation of its obligation to execute a mortgage covering the Subdivision as provided by the agreement dated January 16, 1945, a mortgage which was to have secured the balance of the Village Corporation's indebtedness. Then, on September 9, 1946, the defendant assigned the $2,200,000 note executed by the Village Corporation and secured by the capital stock of both the Village Corporation and the Realty Corporation to the United States.

A suit was then instituted by the United States against Hart and Russell as guarantors for the $2,200,000 note, resulting in a judgment against Hart and Russell for $119,850.56, of which $83,900.63 constituted the balance of the principal on the note. United States v. Hart et al., 215 F. Supp. 35 (M. D. Tenn. 1962), affirmed 312 F. 2d 127 (6th Cir. 1963).

While the claims and causes of action in this and the prior action are different, the Court is nevertheless of the opinion that the plaintiffs' action is barred by collateral estoppel, which is an aspect of the doctrine of res judicata. This doctrine operates to preclude relitigation between the

same parties[1] of issues which were actually adjudicated and determined in a prior action, even though the causes of actions in the two suits are not the same. This distinction is clearly brought out in the discussion of res judicata in 1B Moore's Fed. Practice, Sec. 0.405, p. 621:

> The term res judicata is often used to denote two things in respect to the effect of a valid, final judgment; (1) that such a judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim or demand; and (2) that such a judgment constitutes an estoppel, between the same parties or those in privity with them, as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different. Under the first proposition the judgment operates as a bar—prevents relitigation of all grounds for, or defenses to, recovery that were then available to the parties before the particular court rendering the judgment, in relation to the same claim—regardless of whether all grounds for recovery or defenses were judicially determined. Under the second proposition the judgment prevents the parties from relitigating only those matters that were determined.
>
> While both propositions have the same general objective—judicial finality, the operational difference between them is at times crucial. For clarity we shall use the term res judicata as embracing only the first proposition, and the term collateral estoppel as

[1] Here the parties are the same since the Federal Reserve Bank was acting merely as the fiscal agent of the United States. Mrs. Hart's presence in this action may be disregarded since it is shown that she had no interest in the Country Club Village Corporation except as the holder of one share of stock to qualify her as a member of its board of directors. Even this share was surrendered under the agreement of April 6, 1944.

embracing the second proposition. "The basic distinction," said Chief Justice Warren in Lawlor v. National Screen Service Corp.,

> "between the doctrines of res judicata and collateral estoppel as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit."

An analysis of the complaint in the present case discloses that the plaintiffs seek to recover from the Federal Reserve Bank an amount representing the difference between the value of the Country Club Village Corporation stock and the amount realized from the sale of the subdivision real estate upon the general theory that the Federal Reserve Bank, acting as fiscal agent for the United States, mismanaged the collateral security and by its conduct caused such security to be sacrificed to the plaintiffs' prejudice. Specifically, it is alleged:

(1) That the Federal Reserve Bank participated in the sale to Ellinor or Spring Hill Homes, Inc., of the subdivision property at a "wanton sacrifice."

(2) That the plaintiffs were induced by representations and assurances made by the banks and by the Federal Reserve Bank that the plaintiffs would never be called upon to make good their guaranty and endorsements to enter into and sign the agreement of April 6, 1944.

(3) That no notice was given to the plaintiffs at the time of the sale of said property to Ellinor or to Spring Hill Homes, Inc., as required by the agreement of April 6, 1944, and by the provisions of the Alabama statute.

(4) That the agreement of April 6, 1944, authorizing transfer of the Country Club Village Corporation stock to the banks was contrary to the provisions of Alabama law and therefore void.

(5) That the Federal Reserve Bank by the agreement of December 22, 1945, wrongfully released the obligation of the Country Club Realty Corporation to execute a mortgage on the property.

(6) That the Federal Reserve Bank during the one year period specified and provided for in the agreement of April 6, 1944, "prevented any sales of the individual houses from being made to home owners."

It is clear that the question as to whether the property was sold at a sacrifice was actually adjudicated adversely to the plaintiffs in the prior litigation.[2] It was specifically found both by this Court and the Court of Appeals that the price, $37,140.00, was fair and adequate and that the sale was made in good faith. Consequently, this issue cannot be re-examined in the present case as the basis for a claim by the plaintiffs against the Federal Reserve Bank, acting merely in the capacity of a fiscal agent for the United States.

It is equally clear that the Court determined in the prior litigation that the agreement of April 6, 1944, was made and entered into by the plaintiffs freely and voluntarily and that its execution was not induced by the

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[2] United States v. Joseph W. Hart and J. Carl Russell, Civil Action No. 2299, M. D. of Tenn., Findings of Fact and Conclusions of Law; Supplemental Memorandum, 215 F. Supp. 35; Opinion Court of Appeals, 312 F. 2d 127.

alleged representations or assurances of other parties. This issue is also precluded by collateral estoppel.

The notice question under the agreement of April 6, 1944, was also litigated in the prior action, although the applicability of the Alabama statute requiring the notice be given to stockholders before the sale of all corporate assets was not specifically discussed at the trial stage of the proceeding, or in the opinion of the Court of Appeals. The Alabama statute, however, was cited and relied upon in the Court of Appeals by the appellants, the Government taking the position that the Alabama statute was without application because federal law rather than state law controlled. The Court of Appeals found that the only issue deserving of discussion was the question of the value of the property sold, with the result that it indulged in no discussion of the notice issue or the applicability of the notice requirement of the Alabama statute. It is apparent, however, that the question of notice was actually raised and that it was adjudicated adversely to the plaintiffs, since the Court of Appeals expressly found that "other questions raised by appellants are considered to be without merit." 312 F. 2d 130. In addition, it should be added that the plaintiffs' contention is in any event without merit. The sale was not made until the expiration of the one year period provided for in the agreement of April 6, 1944, and consequently, under the terms of the agreement, no notice was required to be given to the plaintiffs. As to statutory notice to stockholders in the case of a corporation selling all of its assets, the plaintiffs at the time of the sale were no longer stockholders of Country Club Village Corporation, their rights of ownership having been divested by the agreement of April 6, 1944, and transferred to the Banks. Hence, they were not entitled to receive notice of the sale of corporate assets.

The contention was made in the prior action that the agreement of April 6, 1944, was void under Alabama law

because it provided for a one year redemption period rather than a period of two years. This issue was also determined and adjudicated adversely to the present plaintiffs since their defenses were disallowed and the Court of Appeals, as pointed out, found all contentions of Hart and Russell in opposition to the Government's claim "to be without merit."

That the Federal Reserve Bank may have executed a release of the obligations of the Country Club Realty Corporation to execute a mortgage on the property was specifically determined to be immaterial in the prior litigation, this Court pointing out that the property had already been contracted to be sold for $37,140 and that the release of the obligation was necessary to pass a good title to the purchaser, Spring Hill Homes, Inc. United States v. Hart, et al., 215 F. Supp. 35, 36.

The allegation that the Federal Reserve Bank prevented sales to individual home owners during the one year period provided for in the agreement of April 6, 1944, because of its vagueness and generality, is insufficient to state a claim against the Federal Reserve Bank which would not be precluded under the doctrine of sovereign immunity. Since the Reserve Bank was merely a fiscal agent of the War Department under the First War Powers Act of 1941, it would be clothed with the immunity of the sovereign in carrying out its proper functions in complying with its statutory obligation as an insurer of 90% of the Hart and Russell indebtedness, and in receiving and enforcing all rights to collateral security after payment. During the one year period under the agreement of April 6, 1944, the indebtedness was in default, and except for the one year moratorium so provided, the property could have been sold immediately. It is clear from the agreement that a broad discretion is vested in the banks (assignors of Federal Reserve) with reference to enforcement

of collateral and as to questions of sale and foreclosure, and the allegation that Federal Reserve during this period prevented sales to individual home owners, standing alone, and in the context of the facts as they existed, amounts to nothing more than a decision made by the Bank, in the proper exercise of its discretion, not to continue after default in liquidating collateral to sell lots separately but to sell all of the remaining real estate as a whole. If the allegation was intended to infer that full value was not realized from the real estate, the issue was settled against plaintiffs by the direct finding to the contrary in the former suit.

An order will accordingly be submitted to the Court allowing the plaintiffs to amend their complaint as set forth in motion filed August 24, 1965, otherwise disallowing said motion, sustaining the defendant's motion for summary judgment and dismissing the plaintiffs' action, taxing the costs to the plaintiffs, and reciting that the disposition of the action upon summary judgment is based upon the pleadings and exhibits in this action and upon the entire record in the case of United States v. Joseph W. Hart and J. Carl Russell, Civil Action No. 2299, in the Nashville Division of this court, of which the Court takes judicial notice.

William E. Miller,
United States District Judge.

In the
United States District Court
For the Middle District of Tennessee,
Nashville Division.

Joseph W. Hart, Luella F. Hart and J. Carl Russell,

v.

Federal Reserve Bank of Atlanta.

Civil Action. No. 3337.

ORDER—FILED JAN. 21, 1966.

It appearing that the Court has entered its memorandum decision entered January 13, 1966, and said memorandum opinion is incorporated by reference in this order.

It Is Further Ordered, Adjudged and Decreed that the motion on behalf of the plaintiffs filed on the 24th day of August, 1965, requesting leave to amend paragraph 9 of their complaint by inserting certain words and phrases as set out in part I of said motion is hereby granted and the complaint is amended as requested in part I of said motion.

The remainder of said motion is not well taken for the reasons stated in the memorandum opinion entered January 13, 1966, and is, therefore, overruled.

It further appearing that the motion for summary judgment heretofore filed on October 23, 1963, was sustained by the memorandum opinion entered January 13, 1966.

It Is Ordered that the entire record in the case of United States of America v. Joseph W. Hart and J. Carl Russell, Civil Action No. 2299 in the Nashville Division of this Court, of which the Court takes judicial notice, be filed in and made a part of the record in this cause.

It Is Further Ordered, Adjudged and Decreed that the defendant's motion for summary judgment heretofore

filed on October 23, 1963, is sustained for the reasons stated in the memorandum opinion heretofore entered on January 13, 1966, and

It Is Further Ordered, Adjudged and Decreed that the plaintiffs' action is dismissed and the cost of this cause are taxed against the plaintiffs for which execution may issue.

The action of the Court and the disposition of the defendant's motion for summary judgment is based on the pleadings and exhibits in this cause of action and upon the entire record in case No. 2299.

Enter:

/s/ Wm. E. Miller,
United States District Judge.

Approved for Entry:

James F. Neal,
United States Attorney,
/s/ Kent Sandidge, III,
Kent Sandidge, III,
Assistant U. S. Attorney.

Excerpts From First War Powers Act, 1941—Public Law—Ch. 593—Dec. 18, 1941—55 Stat. 838.

An Act

To expedite the prosecution of the war effort.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title I—Coordination of Executive Bureaus in the Interest of the More Efficient Concentration of the Government.

Section 1. That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935: Provided, That the termination of this title shall not affect any act done or any right or obligation accruing or accrued pursuant to this title and during the time that this title is in force: Provided further, That the authority by this title granted shall be exercised only in matters relating to the conduct of the present war: Provided further, That no redistribution of functions shall provide for the transfer, consolidation, or abolition of the whole or any part of the General Accounting Office or of all or any part of its functions.

Sec. 2. That in carrying out the purposes of this title the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or

powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto.

Sec. 3. That for the purpose of carrying out the provisions of this title, any moneys, heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, governmental corporation, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said functions, except to the extent hereafter authorized by the Congress in appropriation Acts or otherwise.

Sec. 4. That should the President, in redistributing the functions among the executive agencies as provided in this title, conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper.

Sec. 5. That all laws or parts of laws conflicting with the provisions of this title are to the extent of such conflict suspended while this title is in force.

Upon the termination of this title all executive or administrative agencies, governmental corporations, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding.

Title II—Contracts.

Sec. 201. The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: Provided, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: Provided further, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: Provided further, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

Excerpts From Executive Order No. 9070.

Consolidating the Housing Agencies and Functions of the Government Into the National Housing Agency.

By virtue of the authority vested in me by Title I of the First War Powers Act, 1941, approved December 18, 1941 (Public Law 354, 77th Congress),[14] and as President of the United States, it is hereby ordered as follows:

1. The following agencies, functions, duties, and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator:

(a) The Federal Housing Administration and its functions, powers, and duties, including those of the Administrator thereof.

(b) All functions, powers, and duties of the Federal Home Loan Bank Board and of its members.

(c) The Home Owners Loan Corporation and the functions, powers, and duties of its Board of Directors.

(d) The Federal Savings and Loan Insurance Corporation and the functions, powers, and duties of its Board of Trustees.

(e) The United States Housing Authority and its functions, powers, and duties, including those of the Administrator thereof.

(f) All functions, powers, and duties relating to defense housing of (1) the Federal Works Administrator under the act of October 14, 1940, entitled "An Act to expedite the provision of housing in connection with national defense, and for other purposes," as amended,[15] and under acts making appropriations to carry out the purposes of said act, (2) the War Department and the Navy Department with respect to housing units for persons (with families) engaged in national defense activities (except housing units located on military or naval reservations, posts, or bases) under Title IV of the Naval Appropriation Act for the fiscal year 1941,[16] and (3) any agencies heretofore designated (including the Federal Works Agency and the Farm Security Administration) to provide temporary shelter in defense areas under the Urgent Deficiency Appropriation Act, 1941,[17] and the Additional Urgent Deficiency Appropriation Act, 1941,[18] and the Third Supplemental National Defense Appropriation Act, 1942.[19]

(g) All functions, powers, and duties of the Farm Security Administration relating to such housing projects as such Administration determines are for families not de-

riving their principal income from operating or working upon a farm.

(h) The Defense Homes Corporation and its functions, powers, and duties, including those of its officers and Board of Directors.

(i) All functions, powers, and duties of the Federal Loan Administrator, the Federal Works Administrator, and the head of any department or other agency relating to the administration or supervision of the agencies, functions, powers, and duties transferred hereunder.

(j) All functions, powers, and duties of the Division of Defense Housing Coordination established by Executive Order No. 8632 of January 11, 1941, and of the Coordinator of Defense Housing: Provided, That such Division and such Coordinator shall continue to exercise such functions, powers, and duties until the appointment or designation of the National Housing Administrator.

(k) All powers, rights, privileges, duties, and functions transferred to the Federal Works Administrator by Executive Order No. 8186 of June 29, 1939:

* * * * * * *

15. All unexpended balances of appropriations, authorizations, allocations, or other funds transferred under this order shall be used only for the respective purposes and in the administration of the respective functions for which such funds were made available.

16. Transfers of available funds under this order shall include funds available for the fiscal year ending June 30, 1943.

17. This order shall become effective as of the date hereof and shall be in force and effect so long as Title I of the First War Powers Act, 1941, remains in force.

Franklin D. Roosevelt.

The White House,
February 24, 1942.

Excerpts From Executive Order No. 9112.

Authorizing Financing Contracts to Facilitate the Prosecution of the War.

Whereas in order that contracts of the War Department, the Navy Department, and the United States Maritime Commission (hereinafter referred to as Maritime Commission) which are now outstanding or may hereafter be entered into for war production, including the obtaining or conversion of facilities, may be promptly and effectively performed, it is essential that additional facilities be provided through governmental agencies to supply necessary funds to contractors, subcontractors and others engaged in such war production pursuant to such contracts;

Whereas the War Department, the Navy Department, and the Maritime Commission have available to them amounts appropriated by Congress which may be used for the purpose of making or guaranteeing loans, discounts or advances or commitments in connection therewith for the purpose of financing contractors, subcontractors and others engaged in such production or otherwise to expedite war production;

Whereas the guaranteeing or making of such loans, discounts, advances and commitments by the War Department, Navy Department and Maritime Commission will be expedited and facilitated by utilizing in this connection the Federal Reserve Banks and the Board of Governors of the Federal Reserve System, which are agencies of the Government exercising functions in connection with the prosecution of the war effort and which have offices and other facilities, including experienced personnel, located conveniently throughout the country and are in close and frequent contact with banking and other financing institutions; and

Whereas the guaranteeing or making of such loans, discounts, advances and commitments will greatly facilitate the participation of small business enterprises in war production;

Now, therefore, by virtue of the authority vested in me by the various provisions of the First War Powers Act, 1941, approved December 18, 1941,[25] by all other Acts of Congress and by the Constitution of the United States, and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order as follows:

(1) The War Department, Navy Department and the Maritime Commission are hereby respectively authorized, without regard to the provisions of law relating to the making, performance, amendment or modification of contracts, (a) to enter into contracts with any Federal Reserve Bank, the Reconstruction Finance Corporation, or with any other financing institution guaranteeing such Reserve Bank, Reconstruction Finance Corporation, or other financing institution against loss of principal or interest on loans, discounts or advances, or on commitments in connection therewith, which may be made by such Reserve Bank, Reconstruction Finance Corporation, or other financing institution for the purpose of financing any contractor, subcontractor or others engaged in any business or operation which is deemed by the War Department, Navy Department or Maritime Commission to be necessary, appropriate or convenient for the prosecution of the war, and to pay out funds in accordance with the terms of any such contract so entered into; and (b) to enter into contracts to make, or to participate with any Federal Reserve Bank, the Reconstruction Finance Corporation, or other financing institution in making loans, discounts or advances, or commitments in connection therewith, for the

purpose of financing any contractor, subcontractor or others engaged in any business or operation which is deemed by the War Department, Navy Department or Maritime Commission to be necessary, appropriate or convenient for the prosecution of the war, and to pay out funds in accordance with the terms of any such contract so entered into.

(2) The authority above conferred may be exercised by the Secretary of War, the Secretary of the Navy or the Maritime Commission respectively or may also be exercised in their discretion and by their direction respectively, through any other officer or officers or civilian officials of the War and Navy Departments or the Maritime Commission. The Secretary of War, the Secretary of the Navy, and the Maritime Commission may confer upon any officer or officers in their respective departments or civilian officials thereof the power to make further delegations of such powers within the War and Navy Departments and the Maritime Commission.

(3) Any Federal Reserve Bank or any officer thereof may be utilized, and is hereby authorized to act, as agent of the War Department, the Navy Department, or the Maritime Commission, respectively, in carrying out any of the provisions of this executive order, and the Secretary of the Treasury is hereby directed to designate each Federal Reserve Bank to act as fiscal agent of the United States pursuant to the provisions of section 15 of the Federal Reserve Act in carrying out any authority granted to it by or pursuant to this executive order. In any case in which any Federal Reserve Bank shall make or participate in making any loan, discount or advance or commitment as agent of the War Department, Navy Department or Maritime Commission under authority of this order, all such funds as may be necessary therefor shall be supplied and disbursed by or under authority from the War De-

partment, Navy Department or Maritime Commission in accordance with such procedure as they may respectively require. Any amounts now or hereafter available under any appropriation act to the War Department, the Navy Department, or the Maritime Commission for the purpose of procuring materials, equipment or supplies, or of expediting production thereof, may be expended through the agency of the respective Federal Reserve Banks in accordance with the provisions of this executive order. In taking any action under any designation or authority given by or pursuant to this paragraph no Federal Reserve Bank shall have any responsibility or accountability except as agent of the War Department, Navy Department or Maritime Commission as the case may be.

(4) All actions and operations of any Federal Reserve Bank under authority of or pursuant to the terms of this executive order shall be subject to the supervision of the Board of Governors of the Federal Reserve System and to such directions and conditions as the Board of Governors of the Federal Reserve System and to such directions and conditions as the Board of Governors of the Federal Reserve System may prescribe, by regulation or otherwise, after consultation with the Secretary of War, the Secretary of the Navy, or the Maritime Commission, or their authorized representatives.

(5) The War Department, the Navy Department and the Maritime Commission shall make reports of all contracts entered into by them respectively pursuant to the terms of this executive order, in accordance with the provisions of paragraph 1 of the regulations prescribed in Title II of Executive Order No. 9001 dated December 27, 1941.

(6) Interest, fees and other charges derived by the War Department, Navy Department and Maritime Commission, respectively, from operations pursuant to the terms of this executive order may be held by the Federal Reserve

Banks and shall first be used for the purpose of meeting expenses and losses (including but not limited to attorneys' fees and expenses of litigation) incurred by the Federal Reserve Banks in acting as agents under or pursuant to the provisions of this executive order; and to the extent that the amount of such interest, fees or other charges is insufficient for this purpose the Federal Reserve Banks shall be reimbursed for such expenses and losses by the War Department, the Navy Department or the Maritime Commission, as the case may be.

Franklin D. Roosevelt.

The White House,
March 26, 1942.

* * * * * * * *

Excerpt From National Housing Act Amendment—77th Cong., 2d Sess.—Ch. 319—May 26, 1942—56 Stat. 301.

Sec. 11. Title VI of the National Housing Act, as amended, is hereby further amended by adding the following new section at the end thereof:

"Sec. 608. (a) In addition to mortgages insured under section 603 of this title, the Administrator is authorized to insure mortgages as defined in section 601 of this title (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided.

"(b) To be eligible for insurance under this section a mortgage shall meet the following conditions:

"(1) The mortgaged property shall be held by a mortgagor approved by the Administrator. The Administrator may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The

Administrator may make such contracts with, and acquire for not to exceed $100 stock or interest in any such mortgagor, as the Administrator may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the War Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Administrator under the insurance.

"(2) The mortgaged property shall be designed for rent for residential use by war workers.

"(3) The mortgage shall involve a principal obligation in an amount—

"(A) not to exceed $5,000,000; and

"(B) not to exceed 90 per centum of the amount which the Administrator estimates will be the reasonable replacement cost of the completed property or project, including the land; the proposed physical improvements; utilities within the boundaries of the property or project; architects' fees; taxes and interest accruing during construction; and other miscellaneous charges incidental to construction and approved by the Administrator; Provided, That such mortgage shall not in any event exceed the amount which the Administrator estimates will be the cost of the completed physical improvements on the property or project, exclusive of off-site public utilities and streets, and organization and legal expenses; and

"(C) not to exceed $1,350 per room for such part of such property or project as may be attributable to dwelling use.

The mortgage shall provide for complete amortization by periodic payment within such term as the Administrator shall prescribe, and shall bear interest (exclusive of premium charges for insurance) at not to exceed 4½

per centum per annum on the amount of the principal obligation outstanding at any time. The Administrator may consent to the release of a part or parts of the mortgaged property from the lien of the mortgage upon such terms and conditions as he may prescribe and the mortgage may provide for such release.

* * * * * * * *

Excerpt From Mobilization of Small Business Act—77th Cong., 2d Sess.—Ch. 404—June 11, 1942—56 Stat. 351, 355.

Sec. 7. The War Department, the Navy Department, and the Maritime Commission are hereby authorized to make or participate in loans, guaranties, and commitments in accordance with Executive Order Numbered 9112 of March 26, 1942, and to participate in or to guarantee any loans made pursuant to this Act with a view to increasing the production of war materials, supplies, or equipment; and in connection therewith they may use any funds heretofore or hereafter made available to them for purposes of procuring war materials, supplies, and equipment, or of expediting the production thereof.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:

Bruszewski v. *United States*, 181 F. 2d 419, certiorari denied, 340 U.S. 865	9
Davis v. *McKinnon & Mooney*, 266 F. 2d 870	9
Graves v. *Associated Transport, Inc.*, 344 F. 2d 894	9
Hart v. *Federal Reserve Bank of Atlanta*, 270 F. Supp. 296	3, 6
Hart v. *First National Bank of Birmingham*, 373 F. 2d 202	2, 3, 9
Lawlor v. *National Screen Service*, 349 U.S. 322	9
United States v. *Hart*, 215 F. Supp. 35 affirmed, 312 F. 2d 127	1, 6
Zdanok v. *Glidden Co.*, 327 F. 2d 944, certiorari denied, 377 U.S. 934	9

Statutes and regulations:

First War Powers Act, 55 Stat. 838	7
56 Stat. 351	8
Executive Order No. 9112, 7 Fed. Reg. 2367	7, 8
7 Fed. Reg. 2368	7, 8
7 Fed. Reg. 2773	8

Miscellaneous:

H. Rep. No. 2131, 77th Cong., 2d Sess.	8
88 Cong. Rec. 4506	8

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 738

JOSEPH W. HART, LUELLA F. HART AND J. CARL RUSSELL, PETITIONERS

v.

FEDERAL RESERVE BANK OF ATLANTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 35-44) is reported at 270 F. Supp. 296. The opinion of the court of appeals (Pet. App. 31-34, as corrected) is reported at 379 F. 2d 961.[1]

[1] A portion of the district court proceedings in an earlier case relied on herein is reported as *United States* v. *Hart*, 215 F. Supp. 35 (M.D. Tenn.), affirmed, 312 F. 2d 127 (C.A. 6). The Findings of Fact and Conclusions of Law in the

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1967. A petition for rehearing was denied by order of July 20, 1967. The petition for a writ of certiorari was filed on October 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in this suit against a Federal Reserve Bank, petitioners may retry issues specifically litigated and decided in an earlier case brought against them by the United States, *viz*, that the sale of collateral of which they here complain was made in good faith and for a fair price, and that petitioners had voluntarily entered into an agreement providing for that sale.

2. Whether, in any event, petitioners are barred from bringing this suit by the passage of 17 years between the accrual of any cause of action and the commencement of this suit.

STATEMENT

In 1942, during the early days of the Second World War, Mobile, Alabama, served as a substantial war production center, and a serious shortage of housing

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earlier case are reproduced in the appendix filed with the court below in the present case, at pp. 57bb-62bb, the memorandum opinion at pp. 49bb-54bb. One of the related cases arising out of the transaction at bar is reported as *Hart* v. *First National Bank of Birmingham*, 373 F. 2d 202 (C.A. 5).

for war workers in the area developed. Petitioners[2] formed a corporation for the purpose of constructing a housing subdivision to fill the need for housing. On application by a local bank, accompanied by a signed agreement between it and petitioners' corporation reflecting the fact that no loan would be made unless guaranteed by the War Department, the construction financing was guaranteed by the Federal Reserve Bank of Atlanta as fiscal agent of the War Department.

The corporation encountered considerable difficulty, and on two occasions the loan and guarantee were increased. The second increase in financing, in October 1943, included petitioners' personal unconditional guarantee of the corporate note, their pledge of the corporate stock to the banks making the loan, and an agreement by the War Department "through the Federal Reserve Bank of Atlanta as fiscal agent of the United States" (20bb-21bb) to purchase, upon demand of the banks, 90% of the unpaid balance of the corporate note guaranteed by petitioners.

By April 1944, the corporation was insolvent and the note was in default.[3] On April 6, 1944, petition-

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[2] Mrs. Hart, a named petitioner herein, was found by the district court not to be a proper party plaintiff. *Hart* v. *Federal Reserve Bank of Atlanta*, 270 F. Supp. 296, 298. That holding was not contested on appeal. Consequently the term "petitioners" is used herein to describe Messrs. Hart and Russell.

[3] A portion of the factual background of this case is set forth in *Hart* v. *First National Bank of Birmingham*, 373 F. 2d 202 (C.A. 5), another of the series of cases which petitioners have instituted against various defendants.

ers entered into an agreement with the banks, by which they conveyed all the stock of the corporation to the banks, free and clear, in return for the banks' promise to forbear enforcement of their rights against petitioners as guarantors of the defaulted note for one year. If the banks exercised their power to sell the corporate stock or assets free and clear of petitioners' claims within a year, petitioners were to be given a thirty-day option to acquire the property on the same terms. Petitioners were also given an opportunity to pay the corporate indebtedness within a year, either by themselves or through the corporation (of which they remained managers), and thus regain the stock held by the banks. Petitioners agreed that, at the end of the one year period, they would have no further rights of any nature to the stock or assets of the corporation.

In September 1944, the banks exercised their right to demand that the War Department honor its guarantee of 90% of the unpaid balance of the loan, which by then had been reduced substantially as other mortgages had been placed on the homes. The War Department paid that amount to the Federal Reserve Bank of Atlanta in October 1944, and the Federal Reserve Bank in turn paid the money to the mortgagee banks. The latter assigned their rights to the Federal Reserve Bank of Atlanta as agent of the War Department, but continued to act as administrators of the loan.

The note remained in default for the one year period following April 6, 1944, and petitioners did not regain the stock. Thereafter, the real property assets

of the corporation [4] were sold as a whole to an outside purchaser. That sale produced $37,170 in cash, which, along with the remainder of the corporate assets, was utilized to reduce the corporation's liability on its note, and consequently the liability of petitioners as guarantors, by $49,919.97. The United States made demand upon petitioners for payment of the amount due under their guarantee on November 19, 1952.

When no payment was forthcoming by late 1956, the United States instituted suit against petitioners to recover the amount due on their guarantee. Petitioners defended that suit on the grounds, *inter alia*, that the corporate assets were sold below value, and that this constituted a misapplication of collateral which released them as guarantors, and further that they had been coerced into entering the agreement of April 6, 1944. The district court rejected those defenses, finding that the agreement of April 6 had been entered into voluntarily by petitioners, and that it had been primarily for their benefit. As to the contention that the sale had been for less than fair value, the court found that the evidence offered by petitioners to prove that defense was "entirely unconvincing and, when considered in its entirety, refutes rather than substantiates this contention." [5] (50bb). Thus

[4] Which had been assumed by a successor corporation.

[5] The evidence offered by petitioners in that case was summarized by the district court at some length (50bb-51bb), and was clearly sufficient to show that there was no fraud and that the sale was fair.

it found the sale to be for a fair and equitable amount (61bb). On petitioners' motion to file an amended answer, the court reiterated those findings. *United States* v. *Hart*, 215 F. Supp. 35 (M.D. Tenn.). The judgment in favor of the United States was affirmed on appeal. *United States* v. *Hart*, 312 F. 2d 127 (C.A. 6).

On November 6, 1962, while the appeal in the suit brought by the United States was pending, petitioners brought this action against the Federal Reserve Bank of Atlanta, seeking recovery of the value of "their" stock in the corporation at the time of the sale, less the amount received in the sale, together with interest. The allegations were essentially the same as those comprising the affirmative defenses in the earlier suit.

The Federal Reserve Bank affirmatively pleaded that (1) Mrs. Hart was not a proper party plaintiff, (2) all matters in controversy were *res judicata* as a result of the earlier action, and (3) the action was barred both by the relevant statutes of limitations and the doctrine of laches. The Federal Reserve Bank moved for summary judgment, and the district court granted that motion, finding that petitioners were collaterally estopped to relitigate the issues that had been determined against them in the prior case. *Hart* v. *Federal Reserve Bank of Atlanta*, 270 F. Supp. 296 (M.D. Tenn.). The court of appeals affirmed, finding itself in complete agreement with the district court's opinion, and holding, in addition, that there was no merit to petitioners' contention that the Federal Reserve Bank had not been authorized to en-

ter into the guarantee of the loan for which petitioners had applied. *Hart* v. *Federal Reserve Bank of Atlanta*, 379 F. 2d 961 (C.A. 6).

ARGUMENT

The decision below is clearly correct and there is no occasion for further review by this Court.

1. The only issue not raised and decided against petitioners in the earlier suit is their contention that the Federal Reserve Bank of Atlanta was without authority to participate in the transactions. But it is plain that the bank was authorized to act as agent for the War Department to guarantee any contract found by the War Department to be "necessary, appropriate or convenient for the prosecution of the war" and that the War Department was entitled to use for such purposes any funds available for expediting production of material, equipment, or supplies.[6] This authority was specifically granted by Executive Order No. 9112, 7 Fed. Reg. 2367 (Pet. App. 52-56), which was authorized under the First War Powers Act, 55 Stat. 838 (Pet. App. 46-49). Executive Order No. 9112 specified that, when a Federal Reserve Bank participated in any commitment as agent for the War Department, "no Federal Reserve Bank shall have any responsibility or accountability except as agent of the War Department * * *." 7 Fed. Reg.

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[6] Indeed, petitioners would seem to be estopped to challenge the authority of the Federal Reserve Bank and the War Department to grant the guarantee for which they themselves had applied.

2368 (Pet. App. 55). On June 11, 1942, Congress passed a bill which specifically authorized the War Department to make loan guarantees in accordance with Executive Order No. 9112. See Section 7, 56 Stat. 351 (Pet. App. 58). That provision was inserted specifically "to give legislative approval to the exercise of authority under Executive Order No. 9112," H. Rep. No. 2131, 77th Cong., 2d Sess., 5; 88 Cong. Rec. 4506.

The Federal Reserve Bank entered into the guarantee agreement in compliance with the procedures set out in Regulation V (7 Fed. Reg. 2773) of the Board of Governors of the Federal Reserve System; the Bank did not execute the guarantee until it received the required certificate of convenience and necessity from the War Department.[7] Thus the Bank was lawfully involved in the transaction.

2. Petitioners' remaining contentions have been litigated before and the courts below were correct in ruling that there was no need to re-examine them. Since the Federal Reserve Bank of Atlanta was acting as agent of the United States in entering into the contracts at bar, it is plain that the Bank is entitled to rely on collateral estoppel as a defense to this action.[8] Petitioners have litigated the issues of the

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[7] This document, together with copies of the application for a War Department guaranteed loan by petitioners' corporation, was furnished to the court of appeals at the instance of counsel for petitioners.

[8] Even if the Federal Reserve Bank had not been acting as agent of the United States, petitioners would be bound by the determination of the pivotal issues in this case against

fairness of the sale of the corporate property and the adequacy of the price therefor, and lost. Petitioners in the past have had ample opportunity to prove the "fraud" they seek to demonstrate in this action; their proof has been found to be "entirely unconvincing" and to refute rather than substantiate their contentions. They are not entitled to try to revive these claims in this suit. See *Lawlor* v. *National Screen Service*, 349 U.S. 322, 326. Thus, as the courts below found, no action for damages could be maintained, since it had been determined in the prior action that there were no damages.[9]

3. In any event, although the courts below found it unnecessary to reach this question, it seems apparent that this action is barred by the statute of limitations. Petitioners' cause of action, if any, accrued no later than the sale of the corporate property in 1945. *Hart*

---

them in the prior action. See, *e.g.*, *Bruszewski* v. *United States*, 181 F. 2d 419 (C.A. 3), certiorari denied, 340 U.S. 865; *Zdanok* v. *Glidden Co.*, 327 F. 2d 944 (C.A. 2), certiorari denied, 377 U.S. 934; *Graves* v. *Associated Transport, Inc.*, 344 F. 2d 894 (C.A. 4); *Davis* v. *McKinnon & Mooney*, 266 F. 2d 870, 873 (C.A. 6).

[9] The allegation (Pet. 10-16) that the sale was unfair because the entire subdivision was sold at once is, in addition to being raised for the first time in this Court, wholly without merit. Petitioners' complaint in this action demonstrates that the buyer of the property did not complete the sale of the individual homes until 1957. (Pet. 13). Individual sales by the banks would plainly have been an inappropriate method of liquidation of collateral. Further, the district court in the prior case specifically found the sale to be fair and equitable. Petitioners cannot here rely on their failure to raise a legal theory in the prior action.

v. *First National Bank of Birmingham*, 373 F. 2d 202, 205 (C.A. 5), and thus is plainly barred under any possibly applicable statute of limitations.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967

[10] Demand by the United States on petitioners for payment is shown by the record herein to have been made on November 19, 1952, almost 10 years prior to the filing of this action on November 6, 1962.

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

JOSEPH W. HART, STELLA F. HART and J. CARL HARTELL,
Appellants,

v.

FEDERAL RESERVE BANK OF ATLANTA,
Appellee.

On Appeal from a Bill of Complaint in the United States District Court for the Northern District of Georgia.

BRIEF FOR APPELLANTS.

INDEX.

	Page
The Purpose of Executive Order No. 9112	2
The Malconstruction of Executive Order Compounded	20
Why Justice Department Cannot Invoke Doctrine of Estoppel to Protect Federal Reserve Bank	25
Why Defense of Federal Reserve Bank by Justice Department Is Contrary to Public Policy	26
Interrogatories Propounded by the Plaintiffs to Nicholas deB Katzenbach, Attorney General of the United States—Filed April 8, 1965	28
Supplementary Statement of Reasons Why Writ Should Be Granted	30
Appendix A—Excerpt From Testimony of Hon. Robert P. Patterson, Under Secretary of War, Before Committee on Banking and Currency, United States Senate, 77th Cong. 2d Sess, on S. 2250, a Bill to Mobilize the Productive Facilities of Small Business in the Interests of Successful Prosecution of the War, and for Other Purposes, Part 2, March 20, 1942, page 329	33
Appendix B—Announcement Concerning War Financing by Board of Governors of the Federal Reserve System Published in Federal Reserve Bulletin, April, 1942, page 424	39
Appendix C—Liaison Officer's Certificate to Federal Reserve Bank of Atlanta	42
Appendix D—Letter to Solicitor General	43
Appendix E—Reply of Solicitor General to Appendix D	47

CITATIONS.

Cases.

Johansen v. U. S., 342 U. S. 427, 72 S. Ct. 849, 96 L. ed. 1051 2

Lee v. Munroe & Thornton, 11 U. S. 366, 3 L. ed. 373.. 24

Scott Paper Co. v. Marcolus Mfg. Co., 326 U. S. 249, 66 S. Ct. 101, 90 L. ed. 47 26

Steele, use of Corn Exchange National Bank v. U. S., 113 U. S. 128, 5 S. Ct. 396, 28 L. ed. 952 30

U. S. v. Hart et al., 312 F. 2d 127, 130 27

U. S. v. Nice, 241 U. S. 591, 36 S. Ct. 696, 60 L. ed. 1192 2

U. S. v. Prescott, 3 How. 578, 11 L. Ed. 734 24

Wisconsin Central R. Co. v. United States, 164 U. S. 190, 17 S. Ct. 45, 41 L. ed. 399 24

Statutes.

First War Powers Act, 1941, Title I 9

First War Powers Act, 1941, Title II, Sec. 201 7

Military Appropriations Act, approved June 20, 1941, 55 Stat. 366 8

Mobilization of Small Business Act (56 Stat. 351)..... 19

National Housing Act Amendment of 1942 (56 Stat. 301) 19

Title 31, U. S. C. A. 626 8

United States Constitution:

Art. I, Sec. 9, Cl. 7 7

Miscellaneous.

Cong. Rec., Vol. 88, Part 3, pp. 3228, 3576 .....9, 17

Cong. Rec., Vol. 88, Part 4, pp. 4503-4507 .....17, 19

Federal Reserve Bulletin, April 1942, pages 299, 424..3, 20

7 Fed. Reg. 10192, Codified at 10 C. F. R. 81.320—First Cumulative Supplement 22
Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate, Seventy-seventh Congress, Second Session on H. R. 6927; April 28 and 29, 1942, pp. 4, 8 16
Hearings Before the Committee on Banking and Currency, United States Senate, on S. 2250, March 20, 1942 6
H. Rep. No. 2030, Conference Report to Accompany H. R. 6868, Sixth Supplemental National Defense Appropriation Bill, 1942 16
House Report No. 2039, Report of the House Committee on Banking and Currency to Accompany H. R. 6927 14
New York Times, March 27, 1942, page 1 5
Senate Report No. 1219, "Conversion of Small Business Enterprises to War Production", Senate Committee on Banking and Currency, March 26, 1942... 5

No. 738.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

JOSEPH W. HART, LUELLA F. HART and J. CARL RUSSELL,
Petitioners,

v.

FEDERAL RESERVE BANK OF ATLANTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITIONERS' SUPPLEMENTAL BRIEF AND REPLY TO THE BRIEF FOR RESPONDENT.

The Justice Department should not have asserted in the brief on behalf of the federal reserve bank that Executive Order No. 9112 "specifically" granted authority to the War Department to guarantee "any contract found by the War Department to be 'necessary, appropriate or convenient for the prosecution of the war'" (Respondent's Brief, page 7). This general language of the executive order must be read in the light of the central

purpose of the order and the history and surrounding circumstances of its issuance. **Johansen v. U. S., 342 U. S. 427, 72 S. Ct. 849, 96 L. ed. 1051.** In construing a statute, this Court in **U. S. v. Nice, 241 U. S. 591, 36 S. Ct. 696, 60 L. ed. 1192,** stated:

> "The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations and not literally, is obvious."

THE PURPOSE OF EXECUTIVE ORDER NO. 9112.

Executive Order No. 9112 was a procurement order, designed to increase production of war materials, supplies and equipment by assisting small manufacturing concerns to take subcontracts under prime contractors with the armed services—especially the Army. It was never in contemplation—by either the President or the Congress—that the armed services would be empowered to enter into the field of private defense housing by adding another government guaranty on top of F. H. A. 90-percent-of-value insured housing loans authorized by other legislation and for which an appropriation was made to Federal Housing Administration.

Executive order No. 9112 read as a whole is not reasonably susceptible of the construction that the president assumed the power to authorize the War Department, the Navy Department and the Maritime Commission to guarantee loans to anybody they pleased for any purpose they pleased so long as they were engaged in **any** business or operation deemed by them to be necessary, appropriate or convenient for the prosecution of the war. In the first paragraph of the preamble the purpose of the order is stated in these words

". . . in order that contracts of the War Department, the Navy Department, and the United States Maritime Commission . . . which are now outstanding or may hereafter be entered into for war production, including the obtaining or conversion of facilities, may be promptly and effectively performed...."

In the second paragraph of the preamble the purposes of the order are indicated as being consistent with (and not outside of) the objects for which appropriations had been made to the three departments by the Congress. This paragraph is as follows:

"Whereas the War Department, the Navy Department, and the Maritime Commission have available to them amounts appropriated by Congress which may be used for the purpose of making or guaranteeing loans, discounts or advances or commitments in connection therewith for the purpose of financing contractors, subcontractors and others engaged in such production or otherwise to expedite war production."

In the Federal Reserve Bulletin for April 1942 at page 299, Executive Order No. 9112 was printed together with a statement by the White House that the order was aimed at curing a situation which had interfered with the all-out participation of small business enterprises in war production. We quote from the Federal Reserve Bulletin as follows:

War Financing Contracts.

The President of the United States on March 26, 1942, issued an Executive Order authorizing the War and Navy Departments and the Maritime Commission to enter into financing contracts to facilitate the prosecution of the war. There is published below the text of this Order together with a statement by the White House.

The White House, Washington, D. C.

March 26, 1942.

The Executive Order authorizing the financing of contracts to facilitate the prosecution of the war is aimed at curing a situation which has interfered with the all-out participation of many small business enterprises in war production. Senators Murray, Mead and Capper have been particularly anxious to bring about this participation. Full production of the nation's smaller businesses is essential to victory.

The Order was prepared by the War Production Board, the War and Navy Departments and the Maritime Commission. It is the opinion of Messrs. Nelson, Patterson, Forrestal and Admiral Land that this order will greatly speed the war production of small business and subcontractors generally.

The basic purpose of the Order is to put working capital financing on a war basis. Up to now peacetime restrictions on banks and credit agencies have made it difficult for them to finance war production although the banks have been anxious to use their resources for prosecution of the war.

Under the Order, the War Department, the Navy Department, and the Maritime Commission may guarantee or make loans when they are needed for war production. These guarantees will support the operations of the banks, the Federal Reserve System, the Reconstruction Finance Corporation, and other credit agencies. They will not be made under peacetime credit rules. They will be made by production men, wherever additional financing is essential for additional production. Peacetime restrictions on credits cannot hold up production of war supplies needed by the armed forces.

The text of the order follows:

(See appendix to petition, page 52.)

On March 26, 1942, the same day President Roosevelt issued Executive Order No. 9112, The Senate Committee on Banking and Currency submitted Sen. Report No. 1219 entitled "Conversion of Small Business Enterprises to War Production." In this report, which recommended the passage of S. 2250, a bill to mobilize the productive facilities of small business in the interests of successful prosecution of the war, appears a statement that on February 5, 1942, the bill S. 2250 was reported unanimously by the Committee on Small Business and referred to the Committee on Banking and Currency. It is stated that extensive hearings were then held by a subcommittee at which various persons expressed their views with respect to the problems confronting small business enterprises and the necessity of mobilizing their activities to the fullest extent in connection with the war effort.

The New York Times on March 27, 1942, on the first page, reported the issuance of the executive order under the following caption:

"ORDERS WAR LOANS TO SMALL BUSINESS —PRESIDENT MOVES TO GUARANTEE WORKING CAPITAL TO OBTAIN CAPACITY ARMS PRODUCTION."

In the body of the news article it was stated that Senators Murray of Montana, Mead of New York and Capper of Kansas were invited to the White House for the ceremonies in connection with the signing of the executive order by President Roosevelt and that Under Secretaries Patterson and Forrestal and Admiral Land were also present. The same news article contained the following statement:

Financing "On a War Basis".

The White House said that the basic purpose of the order was to put working capital financing on a war basis, and added:

"Peacetime restrictions on banks and credit agencies have made it difficult for them to finance war production, although the banks have been anxious to use their resources for prosecution of the war."

Under-Secretary Patterson explained that a small business enterprise, which had a normal annual turnover of $100,000 in peacetime products, might now find itself with $5,000,000 worth of war subcontracts on its books. Unless easy money was provided, he went on, the concern probably would not be able to meet its charges for labor and raw materials.

Until today, Mr. Patterson added, the War Department had been authorized by law to advance only up to 30 per cent of the contract cost to prime contractors, and to make no loans whatever to subcontractors. Under the new policy each of them may be helped up to 100 per cent, if necessary.

In the hearings before the Committee on Banking and Currency United States Senate on S. 2250 on Friday, March 20, 1942, Hon. Robert Patterson, Under Secretary of War, testified that a system for the financing of subcontractors and supplies had been given careful study by the Army, the Navy, the Maritime Commission, and the War Production Board, as well as the Federal Reserve System, that the system was then being formulated and was expected to take effect very shortly under a proposed Executive Order which they thought was proper under the First War Powers Act, "whereby Army and Navy funds already appropriated for supplies can be used to take the risk of loss in advances made to subcontractors

by the regular banking connections of those subcontractors . . .'' An excerpt from Under Secretary Patterson's testimony is printed in the appendix to this brief.

The intent of President Roosevelt as to the authority conferred upon the War Department, Navy Department and the Maritime Commission by Executive Order No. 9112, of course, is that which he had when he signed the order. The order itself discloses that he deemed that his authority to make the order was derived from the Constitution of the United States and the various provisions of the First War Powers Act, 1941, approved December 18, 1941 and by all other acts of Congress.

The part of the First War Powers Act, 1941, deemed to confer authority upon the President to issue Executive Order No. 9112 obviously was Title II, which was as follows:

''Title II—Contracts

''Sec. 201. The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war; . . .''

Appendix to Petition, page 31.

The Constitution forbids that money shall be drawn from the Treasury but in Consequence of Appropriations made by Law (Art. I, Sec. 9, Cl. 7). And there has been

in force for a long time a law providing: "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied to the objects for which they are respectively made, **and for no others.**" (Title 31, U. S. C. A. 626, emphasis added.) We find no provision in the First War Powers Act, 1941 that would make it lawful for the President to authorize the War Department, Navy Department or the Maritime Commission to apply money appropriated for **specific** objects to guarantee **any** contract found by them to be "necessary, appropriate or convenient for the prosecution of the war."

Congress, by the Military Appropriation Act, 1942, approved June 20, 1941, 55 Stat. 366, had made appropriations for the Military Establishment under the headings "Military Activities—Expediting Production" for the object of enabling the Secretary of War, with the approval of the President, "to expedite the production of equipment and supplies for the Army for emergency national defense purposes, including all of the objects and purposes specified under each of the appropriations available to the War Department during the fiscal year 1942, for procurement or production of equipment or supplies for erection of structures, or for acquisition of land; the furnishings of Government-owned facilities at privately owned plants; the procurement and training of civilian personnel in connection with the production of equipment and material and the use and operation thereof; and for any other purposes which in the discretion of the Secretary of War are desirable in expediting production for military purposes and are approved by the President, ..." By the final proviso to this paragraph of the Military Appropriation Act, 1942, it was provided:

> ". . . Provided further, That no obligation shall be incurred for or on account of objects appropriated

for under this head of the Military Establishment except in pursuance of specific appropriations."

By Executive Order No. 9070 issued February 24, 1942, President, by virtue of Title I of the First War Powers Act, 1941, approved December 18, 1941, had directed that all functions, powers, and duties relating to defense housing of the War Department and the Navy Department with respect to housing units for persons (with families) engaged in national defense activities (except housing units located on military or naval reservations, posts, or bases) under Title IV of the Naval Appropriation Act for the fiscal year 1941, should be administered under the direction and supervision of a National Housing Administrator (Appendix to Petition, p. 49).

On March 31, 1942, S. 2250, the bill for conversion of small business enterprises to war production, came on for consideration by the Senate. (Vol. 88, Cong. Rec., Part 3, p. 3228.) Each of the three senators who were invited to the ceremonies for the signing of Executive Order No. 9112 by President Roosevelt made statements concerning the purpose of the executive order and showing how it was related to the bill the Senate was considering. First, Senator Murray said:

"Mr. Murray: . . . A few days ago, the President issued an Executive order in which he authorized the War Department, the Navy Department, and the Maritime Commission to make loans and discounts, advances and commitments, in order to expedite and aid in bringing about complete utilization of small business. The President invited three members of our committee to the White House at the time when he was signing the Executive order; this ackowledged the efforts of our committee to solve the problem. My understanding is that the Executive order will greatly aid in achieving the objects we have sought to

accomplish through our efforts in connection with the bill" (pp. 3228-3229).

Senator Capper stated:

"I believe I appreciate fully some of the possibilities in the President's Executive order taking off the restraints on lending by Government, by R. F. C., by banks, and by other lending agencies, so that working capital may be provided wherever necessary, appropriate, or convenient to the war effort. I appreciate the fact that some of the Government-underwritten loans will be made to small industries, but under that order there is no one, no agency, no responsibility for seeing that the small concerns get any of its benefits.

"The Smaller War Plants Corporation proposed in the pending bill will be in position, will have the responsibility (under control of the War Production Board, so that it will not do anything to hamper war production) to utilize the very broad powers created by the President's Executive order allowing unlimited lending for war production" (p. 3235).

Senator Mead, the other senator, who was invited to the ceremonies in the White House for the signing of Executive Order No. 9112, stated:

"Mr. Mead: Mr. President, as one who is very deeply interested in the problems of small business, as one who, as far back as 1936, introduced a bill to set up a system of guaranteed loans for small business, I wish to make a few observations concerning the measure which is now before the Senate for consideration. The bill, like the President's order, seeks to put working capital, financing, on a war basis, and seeks to eliminate peacetime restrictions on banks and other credit agencies, so that we may cut away

the red tape and expedite the war-production program . . ." (p. 3237).

Senator Taft, in his statement before the Senate, emphasized that the purpose of the executive order by the President was

> "to guarantee the Reconstruction Finance Corporation or anybody else against loss on contracts. In other words the Army and the Navy are making the loans themselves."

Senator Taft further said that the main purpose of the bill under consideration by the Senate was not the loan, the financing. Its main purpose, he said, was "to mobilize small industry to take war contracts. The financing provision is included only because financing is in many cases an essential tool to enable the other work to be done . . ." (p. 3268).

Senator Ellender stated:

> "Mr. Ellender: Permit me to read one of the paragraphs from the President's statement, which I failed to read. I did not think it was necessary; but, in view of the question propounded by the Senator, let me read it:
>
> > The Executive order authorizing the financing of contracts to facilitate the prosecution of the war is aimed at curing a situation which has interfered with the all-out participation of many small-business enterprises in war production. Senators Murray, Mead, and Capper have been particularly anxious to bring about this participation. Full production of the Nation's smaller businesses is essential to victory.
>
> I presume the President had in mind the bill now before us, because it is a product of the Small Busi-

ness Committee, which has held hearings on the subject" (p. 3270).

Question was raised in the Senate as to why the sum of $100,000,000 was fixed as the amount of the capital stock of Smaller War Plants Corporation. Senator Murray answered this question:

"Mr. Murray: Of course, I realize, with the Senator, that $100,000,000 will not go very far; but, as the Senator from Ohio (Mr. Taft) explained a little while ago, what we are undertaking in the pending bill is largely an experiment. We have held hearings, and have brought witnesses here from all over the country, and we realized that we are going to get production. We must get it through some such machinery as that which we are seeking to set up under the bill. We fixed on the sum of $100,000,000 because that would at least give us an opportunity to try out the program. Since the agitation has developed as a result of studies of the committee, the President—as has just been pointed out in the debate—has issued an Executive order in which he has authorized the War Department, the Navy Department, and the Maritime Commission to make advances, loans, and commitments to corporations intending to carry on war production.

"It will be observed that the Executive order is not in conflict with our bill, but is supplemental to it; and the probability is that our loaning activities will be confined to small plants which find it difficult to get loans through the regular channels; but they will be able to secure loans only after having the War Production Board and the corporation set up under Donald Nelson decide that they are competent and capable of carrying through such contracts and that they are essential for the production program" (p. 3270).

Senator Brown of Michigan moved to amend the bill so as to authorize the War Department and the Navy Department to guarantee any loans or advances made by the Smaller War Plants Corporation. He said that the amendment he proposed was identical with the provision in the bill with respect to loans made by the Reconstruction Finance Corporation, and was identical with the language in the Executive order of the President. As passed by the Senate a new section was inserted reading as follows:

> "Sec. 7. The War Department and the Navy Department are hereby authorized to participate in or to guarantee any loans made pursuant to this act, and in connection therewith they may use any funds heretofore or hereafter made available for purposes of procuring war materials, supplies, and equipment" (p. 3274).

At the top of page 8 of the Respondent's Brief the statement is made that on June 11, 1942, Congress passed a bill which specifically authorized the War Department to make loan guarantees in accordance with Executive Order No. 9112. This statement, following as it does, the garbled statements on page 7 concerning the authority conferred upon the War Department and the Federal Reserve Banks by Executive Order No. 9112 could have been misleading to the Court. Why did the Justice Department take out of context and quote only those clauses from the Executive order and H. Rept. 2131 that suited its purpose of trying to persuade the Court that the War Department was given authority to guarantee loans for housing and that Congress had authorized this to be done by the President? Why did they omit to tell the whole truth about the purpose of the Executive order and the Mobilization of Small Business Act?

While Congress had under consideration the bill to mobilize the productive facilities of small business in the

interests of successful prosecution of the war, it also had under consideration a bill to amend the National Housing Act (H. R. 6927). These amendments known as National Housing Act Amendments of 1942 added a new section to Title VI of the National Housing Act to authorize the insurance of mortgages on a 90-percent-of-value basis covering larger rental projects designed primarily for war workers.

On April 20, 1942, H. Rept. No. 2039 was committed to the Committee of the Whole House on the state of the union and ordered to be printed. This was the report of the House Committee on Banking and Currency to accompany H. R. 6927. The Report stated the purpose of the bill as follows:

> "The bill has for its purpose the continuing of the housing program for war workers through the medium of the mortgage insurance provisions of Title VI of the National Housing Act. Its enactment is essential at this time in order to enable private capital to continue its participation in that program, the existing mortgage insurance authority of $300,000,000 under Title VI having been exhausted.
>
> . . . . . .
>
> "Section 11 of the bill adds a new section to Title VI of the National Housing Act so as to authorize the insurance of mortgages on a 90-percent-of-value basis, covering larger rental projects designed primarily for war workers. This new section, except for the 90-percent-of-value limit and certain provisions providing for greater flexibility in the manner of controlling rents and leasing any other practices, contains, as applied to war rental housing, virtually the same provisions as are contained in Section 207 of the present law which operates independently of the emergency.

"Section 12 of the bill provides that nothing in the bill is to be construed to be inconsistent with or to supersede the Executive Order consolidating the various war housing agencies."

On April 22, 1942, the House of Representatives resolved itself into the Committee of the Whole House on the state of the union for the consideration of the bill (H. R. 6927) to amend the National Housing Act, and for other purposes. Mr. Steagall explained the purpose of the bill as being to insure loans for the construction of defense housing in defense areas, and to bring about as far as may be possible the construction of defense housing by private investment rather than by having such construction done under direct appropriation for the war program.

On April 22, 1942, the bill (H. R. 6927, 77th Cong., 2d sess.) passed the House.

On Tuesday, April 28, 1942, a subcommittee of the Committee on Banking and Currency, United States Senate, commenced hearings on the bill. At the commencement of the hearings, Hon. John B. Blandford, Jr., Administrator, National Housing Agency, made a statement before the subcommittee to provide the committee with a bit of background. He stated:

"We have now in the National Housing Agency all of the organizations concerned with housing, and therefore with war housing. We have been trying within the last few weeks to appraise the situation—to find out where we stand in meeting the job of housing war workers and trying to determine what lies ahead. In that effort we are working very closely with the War Production Board because it is the War Production Board that determines, with the War and Navy Departments, the industrial pattern, and therefore the need for workers, and therefore the need for housing.

. . . . . .

". . . I think you can feel completely assured that there is an urgent need for the 200,000 units which we hope private enterprise will provide, and that the $500,000,000 authorization is a conservative estimate of that part of the insurance that will land in F. H. A.; and further, that this is an authorization and that it is under control and that we are daily programming this method of utilizing this authority."

Hearings before a subcommittee of the Committee on Banking and Currency, United States Senate, Seventy-seventh Congress, second session on H. R. 6927; April 28 and 29, 1942, pp. 4, 8.

On May 1, 1942, the Senate Committee on Banking and Currency submitted its report on the National Housing Act Amendments of 1942 which was printed as Senate Report No. 1300. This report stated that the amendments recommended by the committee did not change materially the substantive provisions of the bill as it passed the House. The summary of the provisions of the bill was taken from House Report No. 2039.

On April 18, 1942, H. Rep. No. 2030 was ordered to be printed. This was the Conference Report to accompany H. R. 6868, the Sixth Supplemental National Defense Appropriation Bill, 1942. In the statement of the managers on the part of the House under "Title I—War Department", it was stated:

". . .; the House accepts the Senate amendment modified to make the merged appropriations available for carrying out the provisions of Executive Order 9112 of March 26, 1942, for the guaranteeing or making of loans to **contractors** and thus facilitating the participation of small business enterprises in the war production effort" (Emphasis added).

On April 21, 1942, Representative Clarence Cannon of Missouri, from the managers on the part of the House, explaining the bill on the floor of the House, said:

> "On March 26, 1942, the President issued Executive Order 9112, which authorizes the War and Navy Departments and the Maritime Commission to enter into contracts with any Federal Reserve bank, the R. F. C., or other financing institutions for the purpose of financing any contractor or subcontractor or others engaged in any business or operation which is deemed by War or Navy or Maritime Commission to be in the interest of the prosecution of the war. **This order is designed principally to give assistance to small business in financing its participation in war contracts. Provision has now been made in the bill so that the appropriations for the War and Navy Departments shall be available to carry out without question the intentions of the Executive order.** In my judgment, it was not necessary to include this special provision in the bill, but, since the Senate added the amendments, we see no harm in including them" (Emphasis added).
>
> **Vol. 88, Cong. Rec., Pt. 3, p. 3576.**

On May 13, 1942, H. Rep. No. 2131, the report of the Committee on Banking and Currency on S. 2250, Mobilization of Small Business for War and Essential Civilian Production was printed. On May 25, the bill was considered by the House of Representatives. H. Rept. 2131 is printed in the Congressional Record (Vol. 88, Pt. 4, page 4505). Under the heading "CHANGES FROM THE BILL AS PASSED BY THE SENATE", the following statement is made:

> "Section 7 has been modified so as to give legislative approval to the exercise of authority under

Executive Order No. 9112,[1] and to limit the participation in or guarantee by the War Department, the Navy Department, or the Maritime Commission, of loans made under the act to those loans made with a view to increasing the production of war materials, supplies, or equipment.'' (Emphasis added.)

Mr. Crawford, Representative from Michigan, explained the bill and stated as follows:

> "A third proposition in this bill is set forth in section 7, page 24 of the bill as submitted by the committee, wherein this bill puts in statutory form Executive Order No. 9112, issued by the President, authorizing the War Department, the Navy Department, and the Maritime Commission to guarantee loans made by commercial banks to business, small, intermediate, and large, engaged in producing goods ordered by those three agencies of government, the War Department, the Navy Department, and the Maritime Commission. Anyone who is interested in this production program and in what I would call high financing, can well afford to study these hearings. . . .
>
> Miss Rankin of Montana: Mr. Chairman, will the gentleman yield?
>
> Mr. Crawford: I yield.
>
> Miss Rankin of Montana: What is there in this bill which enables large or small companies, inexperienced in war work, to obtain risk capital to enable them to carry on the new work?
>
> Mr. Crawford: I would say that section 7 goes directly to that question, along with Executive Order

[1] The Justice Department in its brief (top of page 8) quoted the clause "to give legislative approval to the exercise of authority under Executive Order No. 9112," and stopped. It is unfortunate that the remainder of Sec. 7 stating the limitation upon the authority of the War Department, etc., was omitted.

No. 9112. I might enlarge on that just a little. As the war program unfolded itself the President discovered that there was a shortage of credit for certain types of operation, and certain firms. **He issued Executive Order No. 9112, authorizing the Army, the Navy, and the Maritime Commission to use funds appropriated to them by Congress for war production as a basis for guaranteeing loans made to manufacturing companies by commercial banks, the R. F. C., and the Federal Reserve banks.** In other words, through Executive Order No. 9112, which is made law by section 7 of this bill when enacted, it furnishes the risk capital which the lady from Montana has referred to . . .'' (Emphasis added).

Vol. 88, Cong. Rec. Pt. 4, pp. 4503-4507.

On April 28, 1942, the Sixth Supplemental National Defense Appropriation Act, 1942 passed and was approved (56 Stat. 226). On May 26, 1942, the day following the debate in the House on the Mobilization of Small Business Act, the National Housing Act Amendment of 1942 passed and was approved (56 Stat. 301). On June 11, 1942, the Mobilization of Small Business Act passed and was approved (56 Stat. 351).

There is nothing whatsoever in this whole train of circumstances, proceedings and events to indicate that President Roosevelt or the Congress intended to confer any authority on the War Department, the Navy Department or the Maritime Commission to guarantee loans for defense housing. No appropriation was made to the War Department for that purpose. All of the housing functions of the government had been consolidated into National Housing Agency by Executive Order No. 9070. (See Appendix to petition at page 49.) There was a limitation upon the authority of National Housing Agency to 90 percent of the estimated replacement cost of the completed property.

Is it conceivable that the Congress, after plainly limiting the Federal Housing Administrator to 90% loans on defense housing, empowered the War Department to nullify the limitation by the simple expedient of calling defense housing a "war product" and binding the Government to pay the remaining 10% of the loan? To maintain that proposition requires more sublety that the entire Justice Department has been able to conjure up for its client, the federal reserve bank.[2]

THE MALCONSTRUCTION OF EXECUTIVE ORDER NO. 9112 COMPOUNDED.

The statement in the second paragraph of page 8 of the Justice Department's brief that the federal reserve bank entered into the guarantee agreement in compliance with the procedures set out in Regulation V of the Board of Governors of the Federal Reserve System is misleading. The Board of Governors of the Federal Reserve System on April 10, 1942 announced the adoption of Regulation V to carry out the President's Executive Order No. 9112 of March 26, 1942, for the purpose of facilitating and expediting the financing of war production. This announcement was made by a Statement for the Press which was published in Federal Reserve Bulletin for April, 1942 at page 424. For the convenience of the Court this Statement is printed in the Appendix to this Reply Brief.

Had the Justice Department been a little more candid[3] with the Court they would have stated that the certificate

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[2] Petitioners reiterate the statement contained in the footnote on page 5 of their Petition. All of this had been fully explained to the Justice Department before, elaboration therein seemed unnecessary.

[3] There is another incorrect and misleading statement in the Justice Department's Brief. In the footnote on page 8 appears the statement that the application for a War Department guaranteed loan was "by petitioners' corporation." The fact is that the application was not by petitioners' corporation but by one of the financing institutions, The First National Bank of Birmingham.

of convenience and necessity was signed by a major in the Army stationed at the Federal Reserve Bank of Atlanta as a liaison officer. According to the Statement for the Press issued by the Board of Governors of the Federal Reserve System, the only authority of such a liaison officer was to certify to the reserve bank that an applicant for financing was qualified from "the technical or production standpoint to carry out a contract, subcontract or order for war supplies or equipment."

The application showed on its face that Country Club Village Corporation was not a prime contractor holding a prime contract with any unit of the Government. It showed also that Country Club Village Corporation was not a subcontractor having a subcontract or order for supplying war products. It stated in the printed par. 7 reading: "7. War products to be supplied by applicant for loan" that the war products were "Defense housing."

The certificate issued by the liaison officer is printed in the appendix hereto. How it came about that the federal reserve bank, with notice from the application itself that the guarantee was not for a loan to finance either a contractor or subcontractor under a prime contract with the War Department but for a housing loan, nevertheless issued the guarantee is unexplained in this record.

Regulation V contained a statement (Section 5), that the War Department, Navy Department, and Maritime Commission, after consultation with the Board of Governors of the Federal Reserve System, would issue general instructions with respect to the operations of the Federal Reserve Banks under the Executive Order, including provisions regarding the relationships of the Federal Reserve Banks with liaison officers or other field representatives of such agencies. It stated:

> "The operations of the Federal Reserve Banks under the Executive Order shall be conducted in accordance with such instructions."

The War Department did not construe Executive Order No. 9112 as relating to housing. Neither did the Board of Governors of the Federal Reserve System. By Section 7 of Regulation V it was provided:

> "With respect to **financing of production**, except as may be otherwise authorized specifically or by general instructions of the War Department, Navy Department or Maritime Commission, the maturity of any loan made or guaranteed in whole or in part by a Federal Reserve Bank on behalf of such agency shall be consistent with the needs of the borrower **for the fulfillment of the contracts or orders for which the financing is provided**" (Emphasis added).

The War Department's instructions for the handling of loans made under Regulation V were published in the Federal Register (7 Fed. Reg. 10192, codified at 10 C. F. R. 81.320—First Cumulative Supplement). The regulations governing Guarantees, Loans and Commitments, and Advance Payments are a part of Chapter VIII—Procurement and Disposal of Equipment and Supplies. Sec. 81.319 sets forth War Department policy in connection with prime contractors (b) and in connection with subcontractors (c). Subsection (d) deals with cooperation between contracting officers, liaison officers and the Federal Reserve Banks to devise "the most practical method of financing from the standpoint of maximum war production by the contractor." This subsection provides: "if a guaranteed loan or a direct loan, it may or may not be policed as to expenditures by the supply service most interested." And finally, subsection (d) provides that there should be a determination of the method of financing at the time of the award of the contract to prime contractors.

Sec. 81.320 of the War Department Regulations covers the subject of guarantees, loans and commitments under Executive Order No. 9112. This section sets out par. (5)

of Executive Order No. 9112, directing the agencies to make reports of all contracts entered into by them pursuant to the terms of this executive order, in accordance with the provisions of paragraph 1 of the regulations prescribed in Title II of Executive Order No. 9001, dated December 27, 1941. This paragraph relates to contracts and purchases—not to housing.

By Title I, par. 2 of Executive Order No. 9001, the things contracted for were defined very specifically, as follows:

> "2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types of things and services necessary, appropriate or convenient for the prosecution of war, for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament equipment, or supplies of any kind, or any portion thereof, . . ."

Subsection (b) of Section 81.320 of the War Department regulations provides that the administration of the powers conferred upon the War Department by Executive Order 9112 are vested in the Advance Payment and Loan Branch, Fiscal Division, Headquarters, Service of Supply. Subsection (c) provides that financial contracting officers attached to the Fiscal Division, Headquarters, Services of Supply, are to coordinate with the Federal Reserve Banks in arranging financing for businesses whose operations are necessary, appropriate or convenient for the prosecution of the war. By subsection (d) it is provided that liaison officers are attached to the Advance Payment and Loan Branch, Fiscal Division, Headquarters, Services of Supply. Subsection (e) deals with the procedure for obtaining guaranteed loans by contractors. By subsection

(g) it was provided that loans and guarantees must be submitted to the Advance Payment and Loan Branch when the amount exceeded $100,000.

Unquestionably, the certification by the liaison officer of the War Department dated October 31, 1942, prior to the issuance of the War Department Regulations on December 8, 1942, on the basis of which Federal Reserve Bank of Atlanta, as Fiscal Agent of the United States on behalf of the War Department, guaranteed to the two Alabama banks 90% of the loan to finance Country Club Village Corporation

> ". . . in the construction of 425 single family dwelling units with other improvements, including streets, water distribution systems, and power lines; said dwelling units to be located on a tract of land situate in Mobile County, Alabama, on Old Shell Road near Springhill"

was without authority of law. This was an illegal transaction and Federal Reserve Bank of Atlanta was chargeable with knowledge of this fact. The Supreme Court has declared that public policy demands that every depository of public money shall be held to strict accountability. **U. S. v. Prescott, 3 How. 578, 11 L. ed. 734; Lee v. Munroe & Thornton, 11 U. S. 366, 3 L. ed. 373.**

Plaintiffs-Appellants sought a discovery from the Federal Reserve Bank concerning the transaction and the certification on which it relied for the authority to pay out funds belonging to the United States of America under the guarantee agreement. The discovery was denied by the court below.

In **Wisconsin Central R. Co. v. United States, 164 U. S. 190, 17 S. Ct. 45, 41 L. ed. 399,** the Supreme Court declared:

> "As a general rule, and on grounds of public policy, the government cannot be bound by the action of its

officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act unauthorized payments are made. Whiteside v. United States, 93 U. S. 247; Hawkins v. United States, 96 U. S. 689, and cases before cited."

The Justice Department is plainly wrong in stating in its Brief that the Federal Reserve Bank was lawfully involved in the transaction.

WHY JUSTICE DEPARTMENT CANNOT INVOKE DOCTRINE OF ESTOPPEL TO PROTECT FEDERAL RESERVE BANK.

In the footnote at the bottom of page 7 of its Brief, the Justice Department contends that petitioners should be estopped to challenge the "authority of the Federal Reserve Bank and the War Department to grant the guarantee for which they themselves had applied." Heretofore, petitioners have corrected the statement that they applied for the guarantee. The application for the guarantee was made by one of the financing institutions, The First National Bank of Birmingham. The application contains the following statement:

> "12. The applicant for the loan herein referred to (Country Club Village Corporation) has been advised that financing institution is applying for this guarantee in the amount and subject to the terms herein indicated."

In this litigation, petitioners are not seeking to set aside the judgment against them which the Government has obtained. They are seeking to recover from the federal reserve bank the loss which both the United States and themselves have sustained as the result of the vio-

lation of the laws of the United States protecting the public money. **It ill behooves the Justice Department to try to protect the malefactors. It would seem that the Justice Department would try to protect the interests of the United States.**

In **Scott Paper Co. v. Marcolus Mfg. Co., 326 U. S. 249, 66 S. Ct. 101, 90 L. ed. 47,** this Court said:

> "Estoppel cannot, any more than private contract, be the means of successfully avoiding the requirements of legislation enacted for the protection of the public interest."

It is indeed a strange spectacle in this case: petitioners before the Court are seeking to protect the public interest by upholding the Constitution and laws of the United States for the protection of public funds, while the Justice Department is trying to defeat them by raising all manner of legal technicalities.

WHY DEFENSE OF FEDERAL RESERVE BANK BY JUSTICE DEPARTMENT IS CONTRARY TO PUBLIC POLICY.

The Justice Department in its Brief for the Respondent contends that the Federal Reserve Bank was acting as agent for the United States. We have shown that the acts of the Federal Reserve Bank were without authority of law and not binding on the Government.

The Justice Department says that petitioners have litigated the issues of fairness of the sale of the corporate property and the adequacy of the price therefor, and lost. That statement is true. But the reason they have lost is that the Justice Department has not yet produced the evidence in the files of the War Department and the Federal Reserve Bank that will show why the sale of property

was made by private sale en masse for so small a consideration.

The Justice Department says that

> "Petitioners in the past have had ample opportunity to prove the 'fraud' they seek to demonstrate in this action; their proof has been found to be 'entirely unconvincing' and to refute rather than substantiate their contentions. They are not entitled to try to revive these claims in this suit" (Respondent's Brief, p. 9).

The Court of Appeals, in its opinion affirming the decision of the district court in the prior suit, said:

> [2, 3] The government's certificate of indebtedness of the appellants herein which was not questioned was prima facie evidence of the balance of such debt owing by the appellant. We detect no reversible error in the District Court's finding that this evidence was not satisfactorily rebutted through the appellants' claim of bad faith dealings on the part of the banks with the government's assent, the testimony of the appellants' own witnesses having detracted materially from their claim that the price at which these properties were sold was unfair and inequitable. Moreover, the defense of bad faith was an "avoidance" within Rule 8 (c) Federal Rules of Civil Procedure, Title 28, U. S. C. A., and the defendant did not carry the burden of substantially proving this defense.
>
> **U. S. v. Hart, et al., 312 F. 2d 127, 130.**

The Justice Department should be abashed to act upon the failure of the defendants to carry the burden of proving their defense of bad faith dealings with the collateral in the prior suit. Defendants (petitioners before this Court) failed because the Justice Department answered the defendants' Interrogatory No. 9 in the prior suit that

"Plaintiff (United States of America) had no knowledge" of the matters inquired about in the interrogatory (See Petition page 18). But, the War Department and Federal Reserve Bank of Atlanta had knowledge about the matter. They had to have **some** reason for making the sale of the subdivision at the time it was made, for the consideration they agreed to accept and for releasing the lien to enable the sale to be made. If their decision was an honest and good faith decision and they thought that they were acting for the best interests of the United States, they would surely be willing to open their files and show there was no fraud in the sale.

In this present action, petitioners propounded interrogatories to the acting attorney general of the United States as follows:

Interrogatories Propounded by the Plaintiffs to Nicholas deB Katzenbach, Attorney General of the United States—Filed April 8, 1965.

The plaintiffs, Joseph W. Hart, Luella F. Hart and J. Carl Russell, in pursuance to Rule 33 of the Federal Rules of Civil Procedure, propound the following interrogatories to be answered by Nicholas deB Katzenbach, Attorney General of the United States, personally:

Interrogatory No. 1.—Has an investigation ever been made by the Department of Justice, the Federal Bureau of Investigation, or any other officer, agency or department of the United States of America of the sale of Country Club Village housing project in Mobile, Alabama, made in October, 1945, by Federal Reserve Bank of Atlanta, purporting to act as fiscal agent of the United States of America, The First National Bank of Birmingham, Birmingham, Alabama, and The Merchants National Bank of Mobile, Mobile, Alabama, to R. B. Ellinor or Spring Hill Homes, Inc., for $37,170.00 to be paid by

a post-dated check to determine whether this was a good faith sale, for a fair and adequate consideration and for the best interests of the United States of America?

Answer:

Interrogatory No. 2.—If such investigation has been made, will you file a copy of the report or reports of such investigation as exhibits to your answer to these interrogatories?

Answer:

Interrogatory No. 3.—If such investigation has not been made, will you cause to be made a full and thorough investigation of the sale, examining particularly the files of the War Department and Federal Reserve Bank of Atlanta, and state your conclusion whether or not said sale was made in good faith, for a full, adequate and fair consideration and in the best interests of the United States of America, giving reasons for your conclusion.

Answer:

Interrogatory No. 4.—After weighing all pertinent facts surrounding said sale, does it appear that the interests of the United States of America will be best served by the United States continuing to attempt to collect the judgment rendered in its favor against the plaintiffs, Joseph W. Hart and J. Carl Russell, and defending this action for Federal Reserve Bank of Atlanta on the grounds that it is protected by governmental immunity or does it appear in this case, in the language of the United States Supreme Court in **Land v. Dollar, 330 U. S. 731, 738**, that the "dominant interest of the sovereign is . . . on the side of the victim . . ."—in this case the plaintiffs?

Answer:

Fyke Farmer,
Attorney for Plaintiffs.

Why did the Justice Department avoid answering these interrogatories? (Petition for Certiorari, p. 19).

After the Petition was filed and before the Brief of Respondent was filed, petitioners' attorney wrote a letter to the Solicitor General. This letter, together with the reply of the Solicitor General is printed in the Appendix at pages 43-47.

SUPPLEMENTARY STATEMENT OF REASONS WHY WRIT SHOULD BE GRANTED.

This Court has previously held that a private sale of the property of the United States by a naval contractor, without survey, inspection or appraisement, for $2,000.00 which the buyer resold for $8,975.56, was illegal because without authority of law, saying:

> The fact that the account of the appellant was settled by the officers of the Navy Department by charging him with the value of the old material at $2,000 is no bar to the recovery of its real value by the government. The whole transaction was illegal, and appellant is chargeable with knowledge of the fact. It was, in effect, a private sale of the property of the United States without survey, inspection or appraisement, at a grossly inadequate price. The fact that the account had been settled by the officers of the Navy Department did not cure the unauthorized acts. Both the disposition of the property and the settlement of the account were without authority of law and not binding on the Government.
>
> **Steele, use of Corn Exchange National Bank v. U. S., 113 U. S. 128, 5 S. Ct. 396, 28 L. Ed. 952.**

The Justice Department in its Brief for Respondent has made no reply to that section of the argument in the

Petition under the heading, "Want of Authority in Federal Reserve Bank of Atlanta to Release Lien to Allow Private Sale of Subdivision to be Made." (p. 25).

Petitioners submit that public policy forbids that the Judicial Department of the Government condone fraud on the United States and overrides the public policy behind the doctrine of res judicata or collateral estoppel by judgment, insofar as it may have application to this case.

Instead of opposing petitioners' efforts to enforce the liability of the federal reserve bank, the Justice Department should be on their side. (See Motion of the Defendants filed August 24, 1965 in the action in which the United States recovered the judgment against petitioners Hart and Russell, Appendix to Petition, page 34.)

This case, from the standpoint of the amount involved, is little. The principle and public policy involved is very big: honesty in Government, faithful stewardship of the public funds, protection of the public interests under law.

Respectfully submitted,

FYKE FARMER,
511 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioners.

APPENDIX A.

Excerpt from Testimony of Hon. Robert P. Patterson, Under Secretary of War, before Committee on Banking and Currency, United States Senate, 77th Cong. 2d sess. on S. 2250, a Bill to Mobilize the Productive Facilities of Small Business in the Interests of Successful Prosecution of the War, and for Other Purposes, Part 2, March 20, 1942, page 329.

Statement of Hon. Robert P. Patterson, Under Secretary of War, Washington, D. C.

Mr. Patterson: We have given study of the pending bill introduced by Senator Murray and the other Senators conferring with him.

We now have under way a formula or plan for the financing of subcontractors and supplies which has been given careful study by the Army, the Navy, the Maritime Commission, and the War Production Board, as well as the Federal Reserve System.

We have never had a problem in financing prime contractors because Congress gave us authority in 1940 to finance them up to 30 percent by advance payments, and that has been extended. So far as the 30-percent limit is concerned, it has been removed under the First War Powers Act.

The problem has remained that of financing subcontractors, small as well as large—all kinds. In emergencies we have done it by giving the funds to the prime contractor on advances, with directions to extend it down the line, and we have even absolved them in some cases from liability, although I must confess that that was stretching, perhaps, what an advance payment means; but the need was very urgent in the case in which I authorized it.

We have also, in line with trying to get subcontractors financed through prime contractors, authorized all of our district officers in the procurement agencies of the War Department to make advances over and above the conventional 30 percent in cases where the contractor would agree to finance the subcontractors.

Senator Brown: That is, 30 percent of the over-all price in the contract?

Mr. Patterson: Yes; but we have agreed to go beyond that with the prime contractor if he will pass the funds down to his own subcontractors. Of course, that does not solve the problem, for the reason that you sometimes get quite a chain of them—sub-subs.

Also, a concern—a particular subcontractor—will have orders from prime contractors for the Army and also for the Navy, and you can't handle it in a very complete way by doing that.

We believe that the system that is now being formulated, and which we think will take effect very shortly under a proposed Executive order, which we think is perfectly proper under the First War Powers Act, whereby Army and Navy funds already appropriated for supplies can be used to take the risk of loss in advances made to subcontractors by the regular banking connections of those subcontractors, will be a satisfactory one.

The bill pending before the committee, as I understand it, so far as its financial provisions are concerned, limits the relief granted to loans of less than $100,000.

Senator Taft: No; that is wrong.

Mr. Patterson: Is that out?

Senator Taft: That is Mr. Jones' suggestion. He wants to limit it to $100,000. We have in our bill no limit except the capital of the corporation.

Mr. Patterson: I suggest that that amount of the loan should be limited by the need of the company and not by any set sum of money. We have concerns that, oh, 2 years

ago did a business of $50,000 a year and have on their books orders for $10,000,000. I am speaking particularly of concerns making indispensable parts for aircraft. They are small in a way, but in the volume of business we expect them to do they are not small. They are not direct contractors with us; if they were, we could handle the whole thing very readily. They are concerns—subcontractors—that make parts for aircraft assemblies.

Senator Taft: Judge Patterson, do you need legislation to authorize the War Department to say to a contractor, "You must advance so much to a subcontractor, and we will stand the risk of loss"? Do you need specific legislation for that? If so, it could be added to this bill very easily, if the War Department needs that.

Mr. Patterson: It would have been to advantage last summer, certainly, to have had that, because that would be routing in advance to a subcontractor through a prime contractor, as an advance payment to the prime contractor.

I think if we have full power to make loans—they are not advances, because we don't deal with them—loans to subcontractors who need additional working capital, and if that system will be perfected, as I think it will be very shortly, I do not know that we would need that. It would do no harm to have it.

Senator Taft: Without legislation, how will the War Department have that power to make loans to subcontractors?

Mr. Patterson: We would not make the loans. We would take the risk, however, and we would indemnify the Federal Reserve bank, which in turn would participate in it with local banks, or even guarantee a local bank where the subcontractor needed the money and where the Army, the Navy, or the particular procuring agency certified to the need.

Senator Taft: One of Mr. Jones' amendments here authorizes the War Department to guarantee the R. F. C.

against loss. It does not say anything about authorizing the guaranteeing of Federal Reserve banks against loss. Should they be added?

Mr. Patterson: The Executive order we would like to have would authorize us as to any lending agency, and that would include the R. F. C., the Federal Reserve banks, or local banks.

Senator Taft: You think that it may be done under the First War Powers Act?

Mr. Patterson: Yes, sir.

Senator Taft: The contract provision?

Mr. Patterson: Yes, sir. I myself have not studied it carefully, but the lawyers in the War Department, in the Navy Department, and in the War Production Board are all agreed on that.

Senator Taft: I should seriously doubt it, but there may be other provisions that I do not know about. In any event, you are not asking for it?

Mr. Patterson: We view it as primarily a procurement problem.

Senator Taft: You are not asking for legislation, then?

Mr. Patterson: No, sir.

Senator Taft: You think you can get what you want by Executive order?

Mr. Patterson: And very swiftly; yes.

Senator Taft: Do you think you need this provision of Mr. Jones', at the end of his amendment, which says this:

> The Departments of War and Navy are hereby authorized to participate in or to guarantee any loans made by the Reconstruction Finance Corporation pursuant to this provision, and they may use any funds heretofore or hereafter made available for purposes of procuring war materials, supplies, and equipment in connection therewith.

Do you think that is necessary?

Mr. Patterson: It would do no harm, but I suggest, if it is going to be touched upon, that it might be a proper provision to say—

> through the Reconstruction Finance Corporation, through the Federal Reserve banks, or through any other selected banking institutions.

Senator Taft: Your suggestion does not cover the question of trying to convert a number of small plants into pools of materials, and so forth?

Mr. Patterson: It will assist, of course, in financing.

Senator Taft: It is only to finance the actual contract? It does not cover the question of making big loans to a plant to buy machinery?

Mr. Patterson: That would be included.

Senator Taft: Buying machinery?

Mr. Patterson: Yes.

Senator Brown: You have heretofore done that?

Mr. Patterson: Yes, through the Defense Plant Corporation. The problem on financing, I believe, is to give those concerns that have been quite small, concerns that are now called upon to do a great volume of business, working capital. That is the way it is always reported to us; they need working capital.

Senator Taft: That does not really mean that. What you have largely done is to buy machinery and put it in through the War Department?

Mr. Patterson: Yes; through the Defense Plant Corporation.

Senator Taft: Always through the Defense Plant Corporation? Do you not have some independent appropriations?

Mr. Patterson: We have these concerns that employed 50 men 2 years ago but now employ 5,000 men. They need working capital very badly. That is where the problem comes. It is a very pressing problem.

Senator Taft: It only comes to you after the prime contractor has got the contract and says he wants to see it advanced?

Mr. Patterson: He will be making an indispensable part of some aircraft assembly. That is the reason why it is difficult to make an advance through a prime contractor. Some will say, "Yes; I am willing to take a chance on advancing money to this fellow," but others will not want to do it.

APPENDIX B.

Announcement concerning War Financing by Board of Governors of the Federal Reserve System published in Federal Reserve Bulletin, April, 1942, page 424.

War Financing.

Regulation V.

Pursuant to the authority contained in Executive Order No. 9112 of March 26, 1942, published at page 299 of the April 1942 Federal Reserve Bulletin, the Board of Governors of the Federal Reserve System adopted, effective April 6, 1942, Regulation V entitled "War Financing." The text of the Board's press release and of Regulation V is as follows:

STATEMENT FOR THE PRESS.

April 10, 1942.

The Board of Governors of the Federal Reserve System announced today adoption of Regulation V to carry out the President's Executive Order No. 9112 of March 26, 1942, for the purpose of facilitating and expediting the financing of war production. The Regulation was adopted after consultation with the War Department, the Navy Department, and the United States Maritime Commission following conferences in which representatives of the War Production Board participated.

The objective, as set forth in Regulation V, is to facilitate and expedite production for war purposes by arranging for the financing of contractors, subcontractors and others engaged in businesses or operations deemed by the armed services and the Maritime Commission to be necessary for the prosecution of the war.

The War Department has sent initial instructions to the Federal Reserve Banks covering the authority and procedure to be followed by them in acting for the War Department under the Board's Regulation. The program embraces financial aid for contractors and subcontractors, both large and small, and contemplates the maximum participation of small business enterprises in war production.

Regulation V prescribes general rules and policies to govern the operations of the twelve Federal Reserve Banks, which will act as fiscal agents of the armed services and the Maritime Commission in carrying out the President's Executive Order. The utilization of the facilities of the twelve Federal Reserve Banks and their twenty-four branches throughout the United States makes it possible to decentralize the war financing program to a large extent. The program looks to the fullest possible participation by the banks of the United States, whether members or nonmembers of the Federal Reserve System, in the financing contemplated under the authority of the President's Executive Order.

Under the Executive Order the three military procurement agencies are authorized to guarantee commercial banks, Federal Reserve Banks, the Reconstruction Finance Corporation, or other financial institutions against loss on loans made to concerns to finance the performance of war orders. The primary aim is to expand and expedite war production. Accordingly, peacetime credit rules or standards, as the President stated at the time of signing the Executive Order, must not be permitted to hold up production of war supplies needed by the armed forces.

The Board's Regulation authorizes the Federal Reserve Banks, acting in accordance with the provisions of the President's Executive Order and the instructions of the three military procurement agencies, to arrange loans and guarantees thereof wherever it is believed that they will

contribute to the obtaining of maximum war production expeditiously.

To assist in carrying out the provisions of the President's Executive Order and to aid in decentralizing operations under it as fully as possible, the War Department plans to have a liaison officer stationed at each Federal Reserve Bank. Generally speaking, the liaison officer will certify to the Reserve Bank that an applicant for financing is qualified from the technical or production standpoint to carry out a contract, subcontract or order for war supplies or equipment.

It is expected that any applicant will first take up his credit needs with his commercial bank or other financing institution. When the necessary credit cannot be arranged by the financing institution without the assistance of the War Department, the financing institution will apply to the Federal Reserve Bank for a guarantee of a part or all of the proposed financing. After certification by the liaison officer, it will be the Reserve Bank's function to analyze the financial aspects of the application, including the integrity of the management, and determine the type of financing best suited to meet the situation.

Under the initial instructions of the War Department, and upon appointment of liaison officers, guarantees or loans up to a prescribed maximum to be determined by the War Department will be made at the Federal Reserve Bank without reference to Washington.

Attached is a copy of Regulation V.

APPENDIX C.

Liaison Officer's Certificate to Federal Reserve Bank of Atlanta.

War Department
Washington, D. C.

Office of Liaison Officer,
Fiscal Division,
Federal Reserve Bank Building,
Atlanta, Georgia

SPBFR 6-156 October 31, 1942

Memorandum to: Federal Reserve Bank of Atlanta

Subject: Country Club Village Corporation
Mobile, Alabama

On behalf of the War Department and pursuant to the provisions of Executive Order No. 9112 of March 26, 1942, and the instructions from the War Department to all Federal Reserve banks, dated April 8, 1942, as modified, I hereby notify you that the Country Club Village Corporation, Mobile, Alabama, is engaged in a business or operation which is deemed to be necessary, appropriate or convenient for the prosecution of the War, and is in need of funds in order to facilitate or expedite war production.

/s/ J. Elliott Irvine,
J. Elliott Irvine,
Major, A. U. S.,
Liaison Officer.

JEI:mp

APPENDIX D.

Letter to Solicitor General.

Fyke Farmer
Attorney at Law
311 American Trust Building
Nashville, Tenn. 37201
Tel. 256-8506

Nov. 8, 1967

Hon. Erwin N. Griswold
Solicitor General of the United States
Department of Justice
Washington, D. C.

Re: Joseph W. Hart, et al. v. Federal Reserve Bank of Atlanta, Supreme Court No. 738

Dear Mr. Griswold:

You doubtless will assume from the fact that the Justice Department has defended this suit for the defendant, Federal Reserve Bank of Atlanta, and has been successful in procuring its dismissal, that the interests of the United States in some way are on the side of the Federal Reserve Bank. My purpose, as the attorney for the opposing side, is to call your attention to facts which I believe will cause you to conclude that the action of the Justice Department in defending the Federal Reserve Bank has been ill-advised and wrongful. I believe that you, as Solicitor General, will feel that you have the responsibility for making an independent decision as to where the interests of the United States are in this litigation, and that, upon investigation, you will conclude that the Federal Reserve Bank is liable to the United States for the loss it has suffered as the result of its unauthorized acts.

By reading the petition you will see that the War Department had no authority to guarantee the construction loan made by The First National Bank of Birmingham and The Merchants National Bank of Mobile to Country Club Village Corporation for a private residential subdivision. And, of course, it had no authority to purchase, pursuant to the guarantee agreement 90% of the unpaid balance of the indebtedness owing to the two banks by Country Club Village Corporation after application on the loan of the proceeds of the permanent F. H. A. financing. It is axiomatic that Federal Reserve Bank of Atlanta was without authority to act in the transaction as fiscal agent of the United States and bind the United States for the payment of funds for the acquisition of the 90% interest in the unpaid balance of the indebtedness.

As the interests of the United States could not be prejudiced, we may assume that, after the purchase of the 90% interest in the loan indebtedness held by the two Alabama banks, the United States was entitled to be substituted to the rights of the banks to the collateral securing the loan. And now we reach the nub of the matter, i. e., the wanton sacrifice of the security, the completed subdivision. Strangely enough, no claim has been made that The War Department and The Federal Reserve Bank of Atlanta, using their best judgment and acting in entire good faith for what they decided was the best interests of the United States, and The First National Bank of Birmingham and The Merchants National Bank of Mobile, also using their best judgment and acting in entire good faith for what they decided was the best interests of themselves and the debtor and its guarantors, the petitioners in the above captioned case, concluded that it was better to let the whole property go for a mere $37,000 than to keep it and collect the $150,000 unpaid balance from the rents and piece-meal sales of the 430 houses. Such a claim on their part would be tantamount to a con-

fession that they did not possess the business acumen of a real estate operator who turned his investment of $37,100 into a profit of more than $400,000.

But even if The War Department and the three banks had been willing to incur the disrespect and derision that a claim of a simple error in judgment would bring upon them they could not do so in face of the facts. The sale was made as of October 2, 1945. Prior to that time Mr. Hart, one of the petitioners, by letter proposed that the houses be placed on the market at $850.00 or $900.00 above the F. H. A. mortgage. He objected to a memorandum from The War Department suggesting that the houses be sold at approximately $500 above the individual F. H. A. Mortgages saying:

> "We feel that this price is too low, since a survey of Spring Hill Manor, Victory Place and Brookley Heights shows that a difference of from $900.00 to $1300.00 is charged above the mortgage and our suggestion would be that we place our houses on the market at $850.00 or $900.00 above the mortgage with a down payment of $500.00 and the balance to be absorbed over a period of say two years. I have talked to Colonel Irvine and he agrees with me on the price range."

Annexed hereto is a copy of Mr. Hart's letter dated April 7, 1945 addressed to Mr. John A. Hand, Vice President of The First National Bank of Birmingham. Copies of this letter were sent to Lt. Col. J. Elliott Irvine, the War Department liaison officer at Federal Reserve Bank of Atlanta, Mr. V. K. Bowman, Vice President of Federal Reserve Bank of Atlanta, and Mr. T. A. Horst, Vice President of The Merchants National Bank of Mobile.

The profit of $383,988.56 which Spring Hill Homes, Inc., the purchaser of the subdivision, realized from the piece-

meal sales of the houses is an average of approximately $900 per house.

I will not say yet that it is impossible for the Federal Reserve Bank of Atlanta and the two Alabama banks to prove that they did not intend to defraud the United States and Messrs. Hart and Russell, the guarantors of the Country Club Village Corporation indebtedness, but I do say that, on the facts now appearing, the conclusion that they acted from improper and corrupt motives in selling so valuable a property for a mere pittance is irresistible. I do not see how you can in good conscience defend the Federal Reserve Bank.

If I am mistaken about anything herein expressed, I will appreciate your letting me know about it. If I can be of any help to you, please call on me.

Yours very truly,

Fyke Farmer.

APPENDIX E.

Office of the Solicitor General
Washington, D. C. 20530

November 16, 1967

Fyke Farmer, Esq.
311 American Trust Building
Nashville, Tennessee 37201

Re: Hart et al. v. Federal Reserve Bank of Atlanta (No. 738)

Dear Mr. Farmer:

In further response to your letter of November 8, 1967, I wish to advise you that I have considered your views and have examined the proposed reply to your petition as prepared by attorneys of this Department. My conclusion is that the position previously taken by the government in this litigation is a correct one and that it should be maintained. You will shortly receive a copy of the brief elaborating our view of the matter.

Although, as I have indicated, I am unable to concur in your appraisal of the legal issues, I wish to thank you for your efforts in bringing your thoughts to my attention.

Very truly yours,

Erwin N. Griswold,

Erwin N. Griswold,
Solicitor General.